

IN THE FIFTH CIRCUIT COURT
FOR DAVIDSON COUNTY, TENNESSEE

WAYNE A. REED, individually and as)
husband and next of kin of decedent,))
DIANA E. REED,)
)
Plaintiff(s),)
)
vs.) No. 13C417
) Jury Demand
)
SAINT THOMAS OUTPATIENT)
NEUROSURGICAL CENTER, LLC,)
HOWELL ALLEN CLINIC a Professional)
Corporation, SAINT THOMAS)
NETWORK, SAINT THOMAS HEALTH,)
and ST. THOMAS HOSPITAL,)
)
Defendants.)
_____)

TRANSCRIPT OF PROCEEDINGS

Before The Honorable Joe P. Binkley, Jr.

May 14, 2013

Commencing at 1:00 p.m.

Volume 1

Reported by: Deborah K. Watson, RPR, LCR
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1 P R O C E E D I N G S

2 THE COURT: Good afternoon, everyone.

3 See if we can clear up a couple of things first
4 before we start.

5 In Saint Thomas Neurosurgical's
6 objection to some of the -- or several of the
7 discovery requests, there is one statement -- well,
8 let me just read.

9 It says: Communications after the
10 outbreak were obviously very frequent, and such a
11 broad request is virtually impossible to respond to.
12 There are hundreds, if not thousands, of documents
13 responsive to this request.

14 Here's the question that I'm asking:
15 In addition, the information is protected by
16 Rule 1200-14-1-15(2).

17 There is no (2) that I can find. I
18 didn't know -- had not a clue what Rule
19 1200-14-1-15(2) was. Nobody told me what that was,
20 so we had to figure it out. Had to ask you-all.
21 And it's the Rules of the Tennessee Department of
22 Health, Health Services Administration, Communicable
23 and Environmental Disease Services. And
24 1200-14-01.15 is General Measures for the Effective
25 Control of Reportable Diseases.

1 So do we have a misprint?

2 MR. TARDIO: We tried to pull it up,
3 and Mr. Zini, an associate in our office, has seen
4 it. And you'll see probably in the version that
5 Your Honor pulled up, there's a (1); but (2) is no
6 longer, at least on the Website versions that we're
7 trying to pull up today.

8 So, frankly, Judge, I don't know what
9 happened to (2). I can tell you, Mr. Zini, when he
10 read it online and drafted these responses about,
11 what, three or four weeks ago, --

12 MR. ZINI: Yes, sir.

13 MR. TARDIO: -- (2) existed. And (1)
14 is in the -- is still there.

15 THE COURT: Right.

16 MR. TARDIO: (2) has gone away. So no,
17 I don't think it's a typo. And I don't know what
18 happened to it in the online version of the Rules.
19 So, frankly, Judge, I don't have an answer for you.

20 THE COURT: Okay.

21 MR. TARDIO: But I can tell you that
22 the provision, when we read the provision, made
23 confidential information provided to the Department
24 of Health during a communicable disease outbreak
25 investigation, which makes sense. But . . .

1 THE COURT: It made it confidential.

2 MR. TARDIO: Exactly. It didn't
3 address discoverability, and I don't think that that
4 provision is the overarching issue --

5 THE COURT: Right.

6 MR. TARDIO: -- with the request,
7 but . . .

8 THE COURT: No, I agree. But I want to
9 understand everything you-all file.

10 MR. TARDIO: Sure. I understand.

11 THE COURT: I just didn't understand
12 that one.

13 MR. TARDIO: Well, we're still going to
14 try to find (2), which apparently has dissolved in
15 cyberspace somewhere. But (1) still exists, and
16 obviously -- or I shouldn't say obviously when we
17 deal with some of these regs. But --

18 THE COURT: Right.

19 MR. TARDIO: -- if there's a (1), you
20 would think there's going to be a (2).

21 THE COURT: There should be. But
22 anyway, see what y'all can figure out.

23 MR. TARDIO: Okay.

24 THE COURT: And we'll -- that's not a
25 huge issue, but throughout the -- throughout the

1 reading, I just wanted to make sure I understood
2 what y'all were referring to.

3 All right. Now, here's how I handle
4 discovery disputes, and it's probably not unusual to
5 handle it this way. I don't know how everybody else
6 does it. I do them one at a time. And that's the
7 only way to do it. That's the only way to do it
8 effectively. And I'll let y'all argue as much as
9 you need to on each one. When I've made up my mind,
10 I'll stop you and give you a ruling. If I haven't
11 said anything, then just keep arguing, because I'm
12 trying to decide.

13 And I like oral argument. Oral
14 argument's very effective. It's very helpful to me.
15 And besides that, you didn't go to law school just
16 to file papers. You went to law school to argue
17 cases and argue your positions. And I like -- I
18 like oral argument. That's what it's all about,
19 what advocacy is all about. So I'm all for it.

20 Okay. See if I can find . . .

21 Okay. I guess we'll start with --
22 well, anyway, do y'all want to make an opening
23 statement of any kind? I'll be happy to hear you,
24 if you'd like.

25 MR. NOLAN: Sure, Your Honor.

1 THE COURT: Absolutely.

2 MR. NOLAN: Your Honor, George Nolan
3 for the Plaintiff, Wayne Reed. And I guess the
4 first thing we wanted to say is that we appreciate
5 the Court making itself available today and working
6 us in in midweek, kind of outside the normal motion
7 docket schedule for this purpose.

8 THE COURT: Glad to do it.

9 MR. NOLAN: I'd like to make a few
10 preliminary remarks about our theory of the case so
11 that the Court will understand why some of the
12 information we're asking the Court to compel is so
13 vitally important, as far as we're concerned.

14 And, Your Honor, I'd like to start by
15 mentioning that we have two primary theories in this
16 case. The first is a product liability theory. We
17 allege that these particular Defendants are sellers
18 under the Tennessee Product Liability Act and,
19 therefore, can be held strictly liable. I'd like to
20 show the Court something about that.

21 The last time we were here, Mr. Gideon
22 put a statute up on the screen which is part of the
23 Health Care Liability Act.

24 THE COURT: Yes.

25 MR. NOLAN: This is the -- what most

1 lawyers call the med mal statute, Your Honor. I
2 think it's called the Health Care Liability Act
3 and . . .

4 THE COURT: That's the new -- that's
5 the new phrase for --

6 MR. NOLAN: That's right. That's the
7 new -- the new locution. And it defines what a
8 health care liability action is. And as you can
9 see, Your Honor, key to that definition is that in
10 order for something to be a health care liability
11 claim, it must allege that a health care provider or
12 providers have caused an injury. It's got to allege
13 the health care provider caused an injury.

14 Well, Your Honor, our product liability
15 claims don't do that. Our claims are separately set
16 forth in the complaints, and they alleged that the
17 product caused the harm. And that's the whole
18 theory behind strict liability in tort is that when
19 an unreasonably dangerous or defective product is
20 placed into the stream of commerce and it hurts
21 folks, first the manufacturer can be held strictly
22 liable; and if the manufacturer is bankrupt or can't
23 be sued in Tennessee, then the seller can be held
24 strictly liable.

25 And, Your Honor, if you look at page 16

1 of the Reed complaint, focusing on paragraph 93,
2 this is part of our product liability claim in which
3 we allege Saint Thomas Neurosurgical is strictly
4 liable for the injuries and losses caused by the
5 unreasonably dangerous and defective steroids
6 injected into Diana Reed's cervical spine.

7 So I wanted the Court to just be
8 familiar with that theory.

9 It's really, however, Your Honor, our
10 negligence theories that has prompted this discovery
11 that we are arguing about today. And our primary
12 negligence theory is that these particular
13 Defendants were negligent, they were careless, when
14 they chose to buy these steroids in bulk from this
15 particular out-of-state compounding pharmacy.

16 And it's important for the Court to
17 understand that this concern about the safety of
18 compounding pharmacies is not a new thing. It's
19 been going back for more than ten years. There's
20 been hearings in Congress, dating going back to
21 2003, about the dangers of compounding pharmacies.

22 Your Honor, this is a publication put
23 out by the FDA dating back to 2007 in which the FDA
24 puts out this pamphlet about the risks, special
25 risks associated with compounding pharmacies. And

1 here, we have a report from the Centers for Disease
2 Control, Your Honor, that goes back to 2002 talking
3 about a series of fungal infections that were the
4 result of compounded steroids.

5 And this report says -- it says: This
6 report describes five cases of fungal infection
7 associated with contaminated drugs prepared at a
8 compounding pharmacy. Clinicians should consider
9 the possibility of improperly compounded medications
10 as a source of infection in patients after epidural
11 or intra-articular injections.

12 THE COURT: What's the date of this
13 publication?

14 MR. NOLAN: 2002. 2002.

15 So, Your Honor, this is just the tip of
16 the iceberg. There's a lot of medical literature
17 out there about this particular problem in the
18 medical and pharmacy communities. And so, as a
19 result of this concern, the American Society of
20 Compounding Pharmacists put out some written
21 guidelines about how compounding pharmacies should
22 be evaluated. These guidelines, Your Honor, were
23 put out in 2010, so about two years before this
24 outbreak.

25 And we can see here, Your Honor, that

1 the -- this organization of pharmacists recommends
2 several things when vetting a compounding pharmacy.
3 And one of the things, Your Honor, that they
4 recommend is a site visit, a visit to the
5 compounding pharmacy, to check things out. Because
6 these are businesses, Your Honor, which are not
7 subject to the same degree of FDA oversight as are
8 FDA-approved manufacturers like Pfizer, for example.
9 So it's really important to go check these
10 organizations out carefully.

11 Another recommendation, Your Honor, is
12 to check out the regulatory history of a compounding
13 pharmacy before you start buying compounded
14 medications from the pharmacy. And they also
15 recommend checking and seeing whether the pharmacy
16 has been sued, whether it has a history of product
17 liability lawsuits.

18 So, Your Honor, if these pharmacy
19 recommendations had been followed, there would have
20 been a site visit. And that raises the question,
21 well, what was there to see at NECC?

22 This is an aerial photograph of the
23 NECC facility in Framingham, Massachusetts. Here's
24 the facility here (indicating). And behind it, Your
25 Honor, sharing the same site is a garbage compacting

1 operation. And I note here, Your Honor, we have a
2 white structure that is behind the NECC facility
3 that we can use as a frame of reference.

4 That's another photograph, Your Honor,
5 looking at the rear of the NECC facility.

6 So this is the place that these
7 particular Defendants chose -- or from which they
8 chose to purchase their injectable steroids that, as
9 it turns out, were infected with lethal mold.

10 And, Your Honor, that brings us to the
11 first discovery request that we have a disagreement
12 about, Your Honor. In their discovery responses,
13 they have made -- the Defendants, Saint Thomas
14 Neurosurgical and Howell Allen Clinic, make
15 reference to a so-called independent consulting
16 pharmacist, but they will not give us that
17 particular person's name.

18 And in their objection, they interpose,
19 really, two privilege statutes. One is the Peer
20 Review statute that's been on the books since 1967;
21 and the other is the Quality Improvement Committee
22 privilege statute which was passed in 2011.

23 THE COURT: April 12th, 2011.

24 MR. NOLAN: That's right.

25 And, Your Honor, I think it's

1 important, as we --

2 THE COURT: I'm sorry. That's the
3 effective date.

4 MR. NOLAN: That's the effective date.

5 THE COURT: It was passed before that.
6 So that's the effective date of it.

7 MR. NOLAN: Yes, that -- that is
8 correct, Your Honor.

9 And it's important, Your Honor, as we
10 consider the legitimacy of this interposed
11 objection, to just consider the law of privilege
12 generally.

13 Your Honor, in our brief, we made
14 reference to a principle of Black Letter Law in
15 Tennessee, which is: The party asserting a
16 privilege bears the burden of establishing each and
17 every element of the privilege. That's what Don
18 Paine says, and many other courts have said the same
19 thing.

20 We also refer the Court's attention to
21 the "Lee Medical vs. Beecher" case in which our
22 Supreme Court construed the Peer Review Privilege
23 statute, one of the statutes that the Defendant
24 relies on. And in construing that statute, our
25 Court articulated some general principles of

1 construction that applied to any particular claim of
2 privilege.

3 The first principle is: Tennessee
4 favors broad discovery. It's about the search for
5 the truth. That's why we're here. Secondly, Your
6 Honor, privileges are obstacles to the search for
7 the truth, and for that reason, under our Rules of
8 Evidence, privileges are not favored in civil
9 proceedings.

10 So, Your Honor, that's -- that's the
11 law. And our first problem with their assertion of
12 privilege over this pharmacist is they won't even
13 give us the pharmacist's name. They say in their
14 brief that the name is privileged, but they don't
15 offer any authority for that proposition. They
16 don't cite a single case from any court anywhere
17 that makes that holding, nor do they refer us to any
18 language in the statute that says the names of
19 committee members are privileged.

20 Now, they do cite, Judge, a
21 Massachusetts Court of Appeals decision that
22 actually helps our case. And I say that, Your
23 Honor: It's a decision in which the Court in
24 Massachusetts reviewed a circumstance in which a
25 hospital hired an outside consulting doctor to come

1 in retrospectively and look over some charts for a
2 particular dermatologist, and then to actually
3 render -- give a report to the Peer Review Committee
4 of the hospital.

5 Well, there's two reasons why that
6 opinion supports the Plaintiffs' position. The
7 first is, in that Massachusetts case, the name of
8 the consulting expert was revealed. It was
9 discussed. It was mentioned in the -- in the
10 opinions. So it was not withheld under a claim of
11 privilege. And secondly, Your Honor, in that case,
12 the pharmacist gave both the report and testimony to
13 a hospital Peer Review Committee.

14 That's not what we have in this case.
15 These Defendants are not claiming that this
16 particular pharmacist gave anything to a committee
17 organized by any of the Defendants. There is no
18 committee that has been identified by these
19 Defendants.

20 So what is it that they do rely on,
21 Judge, to shield us from this pharmacist? Because
22 we think, Your Honor, not only are we entitled to
23 this person's name, but we're entitled to any
24 communications that went to or came from this
25 particular pharmacist.

1 Well, Your Honor, they have filed a
2 contract with the Court in response -- in their
3 response, and I've put it on our screen. And the
4 first thing we note, Judge, is that this contract is
5 heavily redacted. And there's no explanation as to
6 why. It's been unilaterally done. We don't know
7 what it is that has been hidden. It's just been
8 heavily redacted, even though the Defendants bear
9 the burden of establishing that the privilege, in
10 fact, applies.

11 Secondly, Your Honor, the first time
12 that we saw this contract or even knew that it
13 existed was yesterday. That's the first time we saw
14 it. And this discovery has been outstanding for
15 almost three months. We've been talking about this
16 for a long time. Last week we had a
17 meet-and-converse session for several hours. This
18 contract was never mentioned. It was not provided
19 to us. The first time that it was given to us was
20 yesterday.

21 The second thing about this contract
22 that's interesting is that no signature page has
23 been filed. So there's nothing in the record that
24 shows that this contract was actually signed by both
25 parties.

1 Now, I understand that they don't want
2 us to know the name of the -- of the pharmacist.
3 But there's no reason why they couldn't have filed
4 the signature page, blacked out the name of the
5 pharmacist, so we could actually see the date when
6 this particular instrument was purportedly signed.
7 It's not there. It's not in the record, it has not
8 been provided to us, and we don't know why.

9 And then, Your Honor, if you look at
10 the contract itself, on this first page here on the
11 screen, it mentions parties that aren't involved in
12 this litigation. It says that it's in agreement
13 with Saint Thomas Neurosurgery Center. Well, that
14 entity's not a party to this proceeding. The
15 Defendant in this proceeding is Saint Thomas
16 Outpatient Neurosurgery Center, LLC.

17 Secondly, Your Honor, this contract is
18 dated September the 1st, 2012. Now, Your Honor,
19 according to the Defendants' discovery responses,
20 all of the steroids that were injected into
21 Mrs. Reed were purchased and shipped before that
22 date. So this contract has nothing to do with the
23 time period that is relevant to this litigation.
24 They've just put this contract in the record that
25 does not include the correct date.

1 Your Honor, just before we walked over
2 to the courtroom today, another contract popped up
3 in our in-box, and I'd like to give the Court, if I
4 could, a copy of that. (Tendering document.)

5 The Defendants did a notice of filing
6 late this morning placing this document into the
7 record, so the first time we've seen it is today.
8 And frankly, I'm bringing it to the Court's
9 attention now because we object to the Defendants
10 relying on it today.

11 And here's why. First of all, it
12 mentions yet another entity that doesn't have
13 anything to do with this case: Saint Thomas
14 Neurosurgical Associates. I don't know what that
15 entity is, and there's no proof in the record
16 regarding what that entity is.

17 Secondly, Your Honor, it says it's for
18 the purpose of providing an available pharmacy
19 license for the Oral Surgery Institute. I don't
20 know what the Oral Surgery Institute is. But, Your
21 Honor, I do know that these meningitis cases have
22 absolutely nothing to do with oral surgery.

23 And finally, Your Honor, it's signed by
24 someone named Sullivan, apparently. We don't know
25 who that is. And, Your Honor, there's no affidavit

1 that's been tendered with this document. They just
2 filed the document, apparently intending to rely on
3 it.

4 So we don't know what it is. It hasn't
5 been authenticated. And from the face of it, it
6 appears to have absolutely nothing to do with this
7 lawsuit. Therefore, we object to them relying on
8 it, first of all. And it can't be used by them to
9 meet the burden of establishing that -- that their
10 relationship with this pharmacist is -- is protected
11 by the Quality Improvement Committee privilege.

12 And then finally, Your Honor, I'd like
13 to point out that -- that if you look at the
14 language from the statute, the Quality Improvement
15 Committee statute, the Defendants have not
16 established that this particular pharmacist fits the
17 definition as found in the statute.

18 One thing that both sides agree on,
19 Judge, is that in -- the threshold issue as to
20 whether the privilege applies is whether the
21 person -- or whether we're dealing with the Quality
22 Improvement Committee, you know. Have -- have these
23 Defendants established the existence of that
24 committee? Is this pharmacist a committee? That's
25 what they say.

1 Well, the pharmacist would have to fit
2 one of three definitions. First, is he a committee
3 formed or retained by the health care organization?
4 Well, he's a man, Your Honor. He's not a committee
5 formed or retained by anyone.

6 Secondly, Your Honor, is he an activity
7 of a health care organization? Well, a person can't
8 be an activity. That makes no sense. So --

9 THE COURT: I'm sorry.

10 MR. NOLAN: Sure.

11 THE COURT: Let me make sure I'm
12 following.

13 So B(4), is that what this refers to?

14 MR. NOLAN: Yes, Your Honor.

15 THE COURT: Okay. Okay. I'm -- I've
16 got it all highlighted and numbered, and I just
17 wanted to make sure I was following you.

18 MR. NOLAN: So it's our position that a
19 person can't be an -- an activity. That's
20 nonsensical. And this man is not a committee formed
21 or retained by anyone.

22 So then we're down to No. 3: Is he one
23 or more individuals employed by a health care
24 organization performing one of the enumerated
25 functions?

1 And I focus the Court's attention on
2 the word "employed by." They've made a big deal in
3 their papers about the fact that he is an
4 independent consulting pharmacist, he was an
5 independent contractor, he's not an employee, and
6 was not employed by these particular Defendants.

7 So, Your Honor, to wrap up that issue,
8 and then I'll -- I'll yield the podium to
9 Mr. Tardio --

10 THE COURT: Hold on a minute.

11 MR. NOLAN: Okay.

12 THE COURT: And to be employed by, is
13 it necessary for him to be an employee? I mean, you
14 can be employed and an independent contractor as
15 well as having somebody on the payroll as an
16 employee, can you not?

17 MR. NOLAN: Well, I'm not sure about
18 that, Your Honor. I mean, it said "employed by."
19 It didn't say "contracted by" or "hired by." It
20 says "employed by." And "employee" is a word that
21 has particular legal significance.

22 THE COURT: That's true.

23 MR. NOLAN: But even -- even if it's
24 arguable that maybe this particular pharmacist could
25 fall in with some -- into one of these categories

1 under the statutes, the fact still remains, Your
2 Honor, they have not met their burden of
3 establishing that the privilege applies because they
4 haven't provided the Court with any contract that
5 has anything to do with this lawsuit, according to
6 the proof in the record.

7 So I'll -- would the Court like me to
8 now take the individual requests one at a time and
9 yield to Mr. Tardio on this pharmacist issue?

10 THE COURT: Well, I -- we'll let
11 Mr. Tardio make his opening remarks.

12 MR. NOLAN: Okay.

13 THE COURT: And then we'll -- then
14 we'll start with each contested --

15 MR. NOLAN: Thank you, Your Honor.

16 THE COURT: -- discovery issue.

17 Yes, sir.

18 MR. TARDIO: Thank you.

19 THE COURT: Mr. Tardio?

20 MR. TARDIO: Your Honor, I'm not going
21 to argue our case. Mr. Nolan made a very good
22 opening statement, showed a lot of documents that
23 may or may not relate to the trial of this case.

24 But here we are four months after the
25 outbreak started -- five, six -- six months after

1 the outbreak started, and then the issue in front of
2 the Court is a discovery dispute. That's where we
3 are.

4 THE COURT: Okay.

5 MR. TARDIO: And I -- I do want to
6 point out to the Court that -- one important point,
7 I think, illustrated by some of Mr. Nolan's
8 comments: We're trying to determine what documents,
9 what information is relevant to this case without
10 knowing what law applies because we haven't briefed
11 it yet. Our position, as this Court knows from
12 earlier argument, is that the Products Liability Act
13 doesn't apply here. So we're taking some of these
14 disputes in the abstract.

15 I will address the -- the Quality
16 Improvement Committee statute because it absolutely,
17 100 percent, applies to the relationship between
18 this consulting pharmacist and the STOPNC,
19 Saint Thomas Outpatient Neurosurgical Center. The
20 statute --

21 And, Mr. Wood, why don't you put up the
22 statute?

23 Because I do want to look at the actual
24 language of the statute.

25 The statute defines a Quality

1 Improvement Committee not by its name -- and Lee
2 Medical said that specifically when it was applying
3 the other statute. We don't look at a -- the name
4 of the committee, the name of the people involved;
5 we look at their function. And this statute --
6 which I think it's important to recognize was passed
7 in response to Lee Medical --

8 THE COURT: Are you referring to --

9 MR. TARDIO: 68-11-272.

10 THE COURT: Well, the Lee Medical
11 opinion, are you referring to the fact that the
12 Court, the Supreme Court, our Supreme Court, said
13 the term Peer Review Committee and Medical Review
14 Committee are interchangeable as far as statutory
15 language?

16 MR. TARDIO: It says that. But also in
17 that -- in that opinion, I think at page 16, it says
18 that we don't look specifically at the name; we look
19 at the function.

20 And that's what this statute does. It
21 defines Quality Improvement Committee by the
22 function of the process and the function of the
23 people involved. And it enumerates various
24 functions that -- that constitute what our
25 Legislature has said is a Quality Improvement

1 Committee.

2 And we -- we have to look at this
3 statute in the context of the Legislature's clear
4 decision, in the first paragraph of the statute, to
5 say that the ability of health care providers to
6 evaluate their care, and care that goes on within
7 their facility, is so important to this state and so
8 important to the Legislature that it outweighs
9 discovery of that information in lawsuits; not only
10 the discovery of that information, but also the use
11 of that information.

12 So it's -- it's not admissible. And
13 you can't even get it. And that's the policy behind
14 this statute. It's clear, it's obvious, that --
15 that the Legislature intended it to be broad and
16 strong.

17 THE COURT: There's no way to improve
18 patient safety, quality of patient care, costs,
19 processes, necessity of health care services, unless
20 you have a committee studying that, and finding
21 fault where fault needs to be found so improvement
22 can occur. And that's the -- that's the policy of
23 our state, is to encourage that kind of in-depth
24 review at all times, constantly.

25 MR. TARDIO: And I respectfully submit

1 to the Court that ordering Saint Thomas Outpatient
2 Neurosurgical Center to disclose its communications
3 with a person that it retained, as established by
4 the affidavit, to do exactly what the -- the statute
5 contemplates, evaluate the use of medications and
6 evaluate the care given within those four walls of
7 that facility, to order us to do that would
8 significantly chill this purpose.

9 And if I'm advising a -- an ambulatory
10 surgery center or a hospital, I'm certainly not
11 going to tell them to -- to engage a consulting
12 pharmacist if everything that they communicate with
13 that consulting pharmacist is discoverable.
14 That's -- that's going to be used against them in
15 every lawsuit where -- and that's the intent of this
16 statute: to protect that relationship. So our --
17 the threat --

18 THE COURT: And -- and if that
19 information is used against the health care provider
20 in every lawsuit, then the health care provider
21 stops the process of trying to get better.

22 MR. TARDIO: It takes -- it not only
23 takes away the incentive to get better and to
24 internally evaluate your care, it creates a
25 disincentive to do it.

1 And that's exactly what the -- let me
2 make -- let me another statement, just as a broad
3 brush here.

4 I can't use any of this information,
5 me, if it helps. And 99.9 percent of the time, this
6 information -- maybe not 99 -- 95 percent of the
7 time, it helps. It helps. 95 percent of the time,
8 the committee looks at things and says, "Hey, this
9 is -- this is great." And I'm talking, obviously,
10 in the abstract here.

11 But I can't use it; the Plaintiff can't
12 use it.

13 THE COURT: Right, right.

14 MR. TARDIO: In the --

15 THE COURT: In the process of
16 evaluation, the evaluator can say, "You're doing a
17 good job."

18 MR. TARDIO: Or they can say, "You're
19 doing a terrible job."

20 THE COURT: Right.

21 MR. TARDIO: And either way, they need
22 to be free to give a reasoned, independent
23 evaluation of that care and that process in order to
24 meet that policy set out in Section (a), the very
25 first section of the statute.

1 So as a -- as a broad context for what
2 we look -- we're looking at, we have to interpret
3 the statute to -- with that policy -- with that
4 policy in mind.

5 The -- we have submitted sufficient
6 information into this record to establish that the
7 privilege applies. There is nothing -- nothing
8 nefarious about this -- the contracts we've filed.
9 We redacted the parts that are not relevant. We
10 filed the previous contract, which was referenced in
11 our papers. It's not a surprise. We referenced in
12 our papers and said, "We filed the 2012 contract,
13 but that's the contract that came before that."

14 They say essentially the same thing.

15 THE COURT: The -- the one I just got:
16 February 1, 2007?

17 MR. TARDIO: Yes, sir. It went up
18 through that September of 2012 contract.

19 And the reason we filed those was not
20 to illustrate everything that was involved in this
21 relationship; it was to -- to illustrate for the
22 Court the function and functions that this
23 consulting pharmacist had. And that's why those
24 provisions in the contract are important.

25 So -- now, Mr. Nolan concentrated

1 largely on whether the pharmacist is a Quality
2 Improvement Committee under the statute. He is. He
3 meets all those definitions we put up.

4 But the -- the statute covers both ends
5 of this. It covers the person evaluating the care
6 or the process or what's going on at the facility.
7 It also covers the people who are receiving that
8 information.

9 So in this situation, it covers both
10 the consulting pharmacist who's looking at the
11 medications used, the processes in place, the
12 policies and procedures. It covers his conclusions,
13 the evaluator. It also covers the communications
14 received by the facility. In other words, if I'm
15 the facility, I have to be able to hear what he has
16 to say, and talk about that amongst my colleagues to
17 put his suggestions into place.

18 So if we look at -- let me see --
19 walking through the statute, it's -- it's obvious
20 that it applies.

21 Keep scrolling down. We looked at the
22 policy already.

23 First and foremost, we know -- and I
24 don't know that there's any dispute that STOPNC is a
25 health care organization. It's an ambulatory

1 surgery center regulated under Title 68.

2 This statute also extends the
3 definition of health care organization to any
4 entity -- in (b)(1)(E) -- any entity that contracts
5 with a health care organization to perform any of
6 the functions of a Quality Improvement Committee.

7 So that broadens the definition of
8 health care organization under this particular
9 statute to anyone who contracts with a health care
10 organization.

11 That, right there, gives hospitals and
12 ambulatory surgery centers the ability to contract
13 with outside people to evaluate the care and the
14 processes within their four walls. So under that,
15 (E), the pharmacist consultant, is a health care
16 organization.

17 The statute went so far as to provide
18 us with these definitions so that we didn't -- I
19 mean, obviously, some of these sub-definitions of
20 health care organization aren't what we would
21 normally consider to be a health care organization.
22 So that's why the statute and the Legislature's
23 given us these definitions.

24 So if we continue walking down, it
25 tells us what is a Quality Improvement Committee

1 under the statute.

2 Keep going.

3 So we get to Section 4, where it
4 defines Quality Improvement Committee or QIC. First
5 off, it's a committee formed or retained by a health
6 care organization. So it could be somebody within
7 the organization doing this evaluation; or you can,
8 obviously, retain somebody from outside, which makes
9 sense because not every hospital has every single
10 specialty.

11 Like in the case that we cited, they
12 had to -- they had to consult with an outside skin
13 surgeon because they didn't have somebody on staff
14 to evaluate that -- that care. In this case, we
15 don't have a pharmacist on staff, so we have to
16 retain somebody from outside to evaluate the
17 medication use.

18 It also defines Quality Improvement
19 Committee as an activity of a health care
20 organization, the purpose of which is to evaluate
21 safety quality processes, costs, and necessity of
22 health care services. So it includes within the
23 definition of committee, of Quality Improvement
24 Committee, the activities. And this goes back to
25 the overarching impetus behind the statute to define

1 Quality Improvement Committee by its function, by
2 its acts -- not its name, its acts.

3 So any activity of a health care
4 organization to evaluate safety quality processes,
5 costs, et cetera, that is a Quality Improvement
6 Committee by definition in the statute. And we have
7 to read the words of the statute as the Legislature
8 wrote it.

9 THE COURT: You have to give them their
10 plain and ordinary meaning.

11 MR. TARDIO: Right.

12 And then if we go on to the last
13 definition of Quality Improvement Committee: One or
14 more individuals employed by a health care
15 organization performing these functions.

16 So again, we can tell -- or we can
17 reasonably interpret the statute in that provision
18 to include within Quality Improvement Committee a
19 single person -- a single person evaluating care
20 within a facility, externally retained by, or
21 internally, can qualify as a Quality Improvement
22 Committee.

23 Then we get to the most important part
24 of the statute.

25 THE COURT: You have committee one,

1 basically?

2 MR. TARDIO: Sure. Absolutely.

3 What is a Quality Improvement
4 Committee? What are the functions that qualify a
5 person or a group of people engaging in this
6 process? What are the functions that make them a
7 Quality Improvement Committee? And it lists them.

8 First it gives you the broad -- the
9 broad definition: Evaluating safety quality
10 processes, costs, appropriateness or necessity of
11 health care services.

12 And then it gives you this
13 nonexhaustive list of specific functions that these
14 people can fulfill to qualify as a Quality
15 Improvement Committee.

16 And clearly, based on the affidavit of
17 Ms. Schamberg and the two contracts that are in this
18 record, the function -- the function of the process
19 that the consulting pharmacist and Ms. Schamberg and
20 the STOPNC staff engaged in, the function and
21 functions that they -- that they fulfilled are --
22 clearly fit within the general definition:
23 Evaluation of the safety quality processes, costs,
24 appropriateness and necessity of health care. And
25 they specifically fit within the subdivisions, this

1 nonexhaustive list.

2 So looking at the function of the
3 people involved in this process as evidenced by the
4 affidavit and the two contracts that have been
5 filed, it's clear that both the intent of the
6 arrangement between the pharmacist and the center --
7 both the intent of their arrangement and the way
8 that arrangement was carried out fits within the
9 confines of Section 4, and more specifically 4(a)
10 and the other subdivisions.

11 So they're doing -- they're doing what
12 the statute tells them they can do and what the
13 statute protects.

14 So clearly, both the pharmacist
15 consultant and Ms. Schamberg and the staff engaged
16 in this; they're both Quality Improvement
17 Committees; and from both ends, they fit within the
18 statute's definitions.

19 So then we get to what is protected.
20 And frankly, Judge, under the language of the
21 statute, it's everything, everything related to
22 these functions.

23 THE COURT: If it meets the definition
24 of the -- well, I lost the word.

25 MR. TARDIO: Records?

1 THE COURT: No, the -- well, what am I
2 trying to think of? The exception to the rule is --
3 can't read my mind.

4 Well, anyway, I'll -- I'll think of it
5 in a minute. Go ahead. My apologies.

6 MR. TARDIO: That's fine, Judge.

7 The -- the point of this statute is to
8 protect communications, records, and anything else
9 arising from this relationship. So first, we have
10 filed an affidavit in two contracts to establish the
11 relationship existed, the function of that
12 relationship was consistent with what the statute
13 says Quality Improvement Committees are supposed to
14 do.

15 THE COURT: What I'm trying to say:
16 Meets the definition of privilege. Everything is
17 protected.

18 MR. TARDIO: Exactly. Everything is
19 privileged from discovery and from admission of
20 evidence -- or admission in any judicial or
21 administrative proceedings.

22 So anything that the pharmacist
23 created, any communications between the pharmacist
24 and the Center, and anything created on the other
25 end internally, interpreting or applying what he

1 says.

2 Another important part of the statute:
3 It protects from both direct discovery and indirect
4 discovery. This is -- has to be the broadest
5 privilege statute in our -- or at least one of the
6 broadest privilege statutes that we deal with on
7 a -- on a fairly regular basis. It protects
8 everything within that relationship. And that's
9 because the Legislature felt that was necessary to
10 meet the policies set out in the first section.

11 So clearly -- clearly, we have a
12 Quality Improvement Committee by function, as
13 established by the affidavit in the contracts;
14 clearly, we have documents and communications that
15 have been identified that arise from this
16 relationship; and clearly, under the plain language
17 of the statute, they're protected and privileged.

18 So I would respectfully submit, Your
19 Honor, that the documents created by the consulting
20 pharmacist and any communications arising from the
21 relationship are privileged.

22 Thank you, Judge.

23 THE COURT: All right. Thank you.

24 Rebuttal?

25 MR. NOLAN: Thank you, Your Honor.

1 Your Honor, the Court mentioned the
2 "Lee Medical vs. Beecher" decision.

3 THE COURT: Yes.

4 MR. NOLAN: And one of the things
5 that -- that the Supreme Court said in that decision
6 is that there are certain presumptions that courts
7 can consider when construing statutes. And they
8 said: Courts may also presume that the general
9 assembly did not intend an absurdity.

10 Your Honor, the way that these
11 Defendants are construing this statute is so broad
12 that if someone at Saint Thomas Neurosurgical went
13 into the broom closet and talked to themselves, that
14 could be labeled a Peer Review -- a Quality
15 Improvement Committee meeting. That just doesn't
16 make sense.

17 As the Court observed, Your Honor, the
18 purpose of the Quality Improvement Committee
19 privilege is so that health care providers can form
20 committees and actually study the quality of care,
21 particularly retrospectively, so that if something
22 bad happens, we don't want it to be repeated.

23 But this is not a circumstance in which
24 Saint Thomas Neurosurgical, after this outbreak
25 occurred, went out and hired this particular

1 pharmacist to do a postmortem look-back and figure
2 out what happened, why it happened, and how it could
3 be prevented in the future. Now, if that happened,
4 maybe they would have an argument that it should be
5 a Quality Improvement Committee circumstance.

6 But that's not what we have here, Your
7 Honor. What we have here is a record that is
8 completely absent of any reliable information
9 indicating that this pharmacist was -- meets the
10 definition of a Quality Improvement Committee.

11 Mr. Tardio didn't talk about the burden
12 that we have here today, but it's his client's
13 burden to establish that this privilege applies.
14 And under the contracts that have been filed, Your
15 Honor, they simply can't meet the burden.

16 Another thing he did not talk about is
17 the fact that the statute does not say they're
18 entitled to keep the names of a purported committee
19 member secret. So, Your Honor, you know, if they
20 came forward and said, "Here's the committee.
21 Here's its members. They have regular meetings, and
22 we're not going to tell you what the meetings
23 were -- what was discussed, and we're not going to
24 give you the minutes. But we'll tell you we have a
25 duly-constituted committee and -- and it met, and it

1 didn't look back about this fungal meningitis
2 outbreak," then we think it would be a closer
3 question.

4 But none of it, no information like
5 that is in the record, Your Honor. We ask the Court
6 to find that they have not met their burden, and
7 that this information is plainly discoverable.

8 THE COURT: So the Plaintiffs' position
9 is -- make sure I understand, and tell me if I'm
10 wrong -- is that if the committee of one in this
11 case, the pharmacist, was contracted after the fact
12 of the -- of the issues in question in this case,
13 that the Quality Improvement Committee of one
14 created after the fact is not what the Legislature
15 intended to be protected?

16 MR. NOLAN: That's right, Your Honor.
17 If you look at the -- if you look at the Lee Medical
18 opinion and its discussion of Peer Review Committees
19 and how they should be entitled to do postmortems,
20 and look at a doctor's conduct and decide whether --
21 what should be done, there's no question that would
22 be privileged information.

23 But that's not what we have here. I
24 mean, what they're saying is, when they put these
25 contracts in the record, Your Honor, with entities

1 that aren't parties to the case that apparently have
2 nothing to do with the case, and they say, "Oh,
3 well, that means everything that happened with this
4 particular pharmacist is privileged," and that
5 doesn't -- that doesn't make sense.

6 I mean, the only thing they rely on,
7 Your Honor, is a statute that I would suggest is not
8 a blue-ribbon example of draftsmanship. It's --
9 it's very confusing. But they haven't put
10 information in the record to show that they fall
11 within the purview of the statute.

12 That's our position.

13 THE COURT: Okay. Thank you.

14 MR. TARDIO: Very briefly, Judge. I
15 just want to respond to that.

16 THE COURT: Okay.

17 MR. TARDIO: Two points, Your Honor,
18 specifically from Mr. Nolan's statements. First,
19 we're again hung up on the word "committee." The
20 statute clearly defines Quality Improvement
21 Committee by the function of what these people are
22 doing, and it clearly can involve just one person on
23 the evaluator's side and on the facility's side, and
24 it clearly contemplates engaging people outside the
25 facility to perform these evaluation functions.

1 THE COURT: I -- I think I agree with
2 you on that. But what about the formation for
3 the -- for the contracting of this individual -- in
4 this case, the pharmacist -- after the fact?

5 MR. TARDIO: Well, he -- he was
6 contracted in 2007. The second contract was signed
7 in 2012.

8 THE COURT: Okay.

9 MR. TARDIO: That's why we have the
10 two. And in our -- in our brief, what we did is we
11 filed the newest contract; and then in our brief, we
12 said the previous contract set out the same
13 functions. And then this morning, I thought, well,
14 we better get the old contract in the record, too,
15 so . . .

16 THE COURT: Well, I think Plaintiffs'
17 position is on the old contract. Of course, the new
18 contract doesn't tell us much. The old contract
19 tells us a little more.

20 First of all, the old contract says it
21 was entered into as a pharmacy consulting contract,
22 number one, entered into, it looks like, February 1
23 of 2007. Looks like it was signed 3-20-07; however,
24 the date on the pharmacist's signature was blacked
25 out. It looks like there was -- there was an

1 attempt to make a line through a 7. But it could --
2 could be -- could be a 12 -- I mean, a 2, '02. But
3 '07 looks like what it is.

4 But anyway, the point is, it's between
5 Saint Thomas Neurosurgical Associates and a
6 duly-licensed pharmacist for the purpose of
7 providing an available pharmacy license for the Oral
8 Surgical Institute, licensure by the Tennessee
9 Department of Health.

10 I'm not sure I understand what that
11 means either.

12 MR. TARDIO: Well, I think the "Oral
13 Surgery" part is a cut-and-paste from another
14 contract, not . . .

15 THE COURT: So it shouldn't have been
16 in there?

17 MR. TARDIO: Well, it should say
18 probably Ambulatory Surgery Center or Saint Thomas
19 Neurosurgical Center.

20 THE COURT: But it doesn't say that.

21 MR. TARDIO: I agree. That's why we
22 filed the affidavit where she says, "This is the
23 relationship." So even if we didn't have a contract
24 in place, --

25 THE COURT: Yeah.

1 MR. TARDIO: -- the affidavit says,
2 "This is the relationship I had with this person."

3 THE COURT: The point -- but the
4 affidavit doesn't say when the relationship began
5 between the pharmacist and your client.

6 MR. TARDIO: You're right, Judge. And
7 I'm certainly willing to supplement that with a time
8 period. I will represent, as an officer of the
9 court, it began in 2007 with that first contract.

10 THE COURT: Okay. That's why I was
11 confused.

12 MR. TARDIO: And I understand, Judge.
13 We talk about the draftsmanship of the statute. The
14 draftsmanship of the contract's also not super.

15 But one thing the -- the contracts and
16 the affidavit are clear on is the function that the
17 pharmacist fulfilled. And that's what's important
18 under the statute. And this suggestion that only
19 after-the-fact evaluation of care is protected by
20 the statute is absolutely contrary to the language
21 of the statute which protects education of staff.
22 Clearly, the intent being that you prevent some of
23 these things from happening; not just you determine
24 that they shouldn't have happened. It covers
25 education. It covers improvement, because you're

1 trying to improve on the front end.

2 The goal of the statute is obviously to
3 provide better care; not to evaluate care after the
4 fact and say, "Well, we shouldn't" -- the goal is,
5 going forward, the policy is to -- to provide better
6 health care for the residents of this state.

7 THE COURT: So the Defendants' position
8 is, it doesn't matter when the consultant was
9 contracted, if it was before the fact of what we're
10 here about, or after the fact. They're performing
11 the same function.

12 MR. TARDIO: Right. He's been
13 performing that function since 2007. And if the
14 Court is hung up on the language of the statute,
15 we'll supplement our affidavit to say that the
16 relationship began in '07.

17 And I understand that it's not entirely
18 clear --

19 THE COURT: Well, I'm just trying to
20 clear it up.

21 If the -- if your position is, it
22 doesn't matter when the consultant was contracted,
23 then -- or contacted. Doesn't have to be
24 contracted, just contacted.

25 MR. TARDIO: Sure.

1 THE COURT: You don't have to have a
2 contract.

3 MR. TARDIO: Absolutely.

4 THE COURT: If the contact or contract
5 was made after the fact, it's -- he or it, the
6 committee -- in this case, committee of one,
7 pharmacist -- is performing the function, that is
8 protected by the statute.

9 MR. TARDIO: I don't think that's --

10 THE COURT: Is that -- is that your
11 position?

12 MR. TARDIO: Yes, sir.

13 And I don't think there's any question
14 he was performing that function by the terms of the
15 contract and the -- and the explicit testimony in
16 the affidavit, at this point unrebutted.

17 Of course, if he's contracted after the
18 fact, we have a relevance issue because he didn't --
19 but I'm telling -- I'm representing to the Court he
20 was contracted before this outbreak, and he was
21 performing these functions before this outbreak
22 occurred, and that his role was to evaluate the care
23 and the use of medications at Saint Thomas
24 Outpatient Neurosurgical Center as set out in the
25 contracts and, more specifically, in the affidavit.

1 That was his role, that was his
2 function, that was what he did, and that's what the
3 statute protects.

4 Thank you, Your Honor.

5 THE COURT: All right. You'll get the
6 last word, Mr. Nolan.

7 MR. NOLAN: Your Honor, 15 people have
8 died, and more than 100 have gotten sick, meningitis
9 from injections that were given at Saint Thomas
10 Neurosurgical. So this is a very serious matter.
11 And they're trying to shield us from the identity of
12 a very important player in this. And the only thing
13 they've done is come forward with these contracts
14 that don't lend any support for their position;
15 contracts, Your Honor, that aren't with any of the
16 parties to this lawsuit. Contracts that say -- or
17 one of them says that it's for the purpose of
18 licensure for an Oral Surgical Institute.

19 And that is against a backdrop of: Its
20 their burden, its their burden to convince the Court
21 that this information should be shielded from all
22 these victims. And that's not right, it's not fair,
23 and it's contrary to the law. And we ask for the
24 information.

25 Thank you.

1 THE COURT: Okay. Because of the
2 previous discussions about this case, meetings with
3 you-all in the courtroom about this case, I have
4 heard the reference to the fact that the name of the
5 entity or entities, Saint Thomas Outpatient
6 Neurosurgical Center, LLC and/or Howell Allen
7 Clinic, have changed from time to time. And maybe
8 that is one of the issues with these -- with the
9 affidavit, with the contract. I mean, I don't know.
10 And I think that's -- I think that's what the
11 Plaintiff is referencing, that a lot of these --
12 these names that have been -- except for the
13 affidavit. The affidavit states what the present
14 names are.

15 But I think the names, based on your
16 discussions about this case, that -- the names
17 weren't that important to me at the time, but I have
18 heard you-all say the names have changed. These
19 entities' names have changed. And maybe that's --
20 maybe an affidavit is needed to substantiate that
21 and/or maybe documents to substantiate that.

22 You know, if they're -- if they're
23 corporate entities and they're -- you know, they've
24 done the necessary filings with the Secretary of
25 State to show and trace the origin and history of

1 the different names that these entities have had
2 over time, that may -- may add some authenticity to
3 these pharmacy -- this pharmacy that's on the
4 contract, the one that I was just handed today, that
5 I think the Plaintiffs were just handed today, dated
6 February 1, 2007. And maybe that will answer some
7 of the Plaintiffs' issues.

8 But I don't know -- I don't really want
9 to put this off either. So I'm just putting that
10 out as a means, possibly, of resolving that issue.

11 MR. TARDIO: Your Honor, we can have an
12 affidavit that says their relationship extended back
13 to 2007 in the record today. I think that our
14 affidavit kind of broad-strokes what the
15 relationship was, but I'm more than willing to
16 supplement with an affidavit that sets out the time
17 frame.

18 THE COURT: Okay. Well, the names of
19 the entities, too. Or maybe -- maybe that will take
20 care of it. Maybe an -- a supplemental affidavit
21 from Debra Schamberg, registered nurse, who is
22 the -- she's the facility director of Saint Thomas
23 Outpatient Neurosurgical Center and is also a
24 registered nurse. Have her affidavit that states
25 date pharmacist was consulted for the first

1 consulting. And by this named facility that we
2 know -- by the name we know of today and maybe the
3 names of -- name or names of that facility were
4 different earlier on. Something to that effect, I
5 think, would help.

6 It would help -- it would help the
7 record -- it would clear the record up, because the
8 Plaintiffs made an issue about it. I mean, I think
9 it needs to be cleared up. And the Plaintiffs have
10 got every right to make an issue of that. It's --
11 they're being good advocates for their clients by
12 doing that.

13 And I know we're kind of on a pushed
14 schedule here to make sure these depositions go off
15 as requested and planned. And that's probably the
16 reason for the need for a supplemental affidavit of
17 Debra Schamberg.

18 Am I making sense to the Plaintiffs?
19 Does that -- would that help any? Of course, it
20 depends on what it says, I guess, as to whether it
21 helps or not. But do you understand what I'm
22 getting to?

23 MR. NOLAN: Yeah. I mean, I -- I do
24 think it depends on what -- what it says.

25 THE COURT: Says, yes.

1 MR. NOLAN: Very respectfully, I mean,
2 our, of course, position is that, I mean, they've
3 had their chance to put whatever they wanted to in
4 the record, --

5 THE COURT: And today is --

6 MR. NOLAN: -- and now the issue is
7 before the Court.

8 THE COURT: -- today is the -- and I've
9 heard that, too. I heard that argument, too. If
10 they haven't done it today, they're too late to
11 establish the privilege. That's another issue for
12 me to decide.

13 But I'm glad we're -- we're talking
14 about this before we start with the -- with the
15 issues of whether or not information is to be
16 revealed, because a lot of it depends on whether the
17 privilege applies. So it's a good way to start --
18 start the discussion.

19 So what do you say, Mr. Tardio, to the
20 Plaintiffs' position that everybody knew what we
21 were supposed to do today? And if it hadn't been
22 done to the satisfaction of -- of the Plaintiffs and
23 maybe to the satisfaction of the Court, is it too
24 late? Are you too late to establish your privilege?
25 Or is the privilege a privilege no matter what

1 and -- and it -- and it can't be waived by the
2 lateness of the presentation of proof to show the
3 privilege?

4 MR. TARDIO: I think, respectfully,
5 Your Honor, the record, as is, is sufficient. I
6 respectfully submit that even if you don't -- don't
7 consider the contracts, we still have an affidavit
8 that says, "This is the relationship we had with
9 this consulting pharmacist."

10 So I respectfully submit the record, as
11 is, is sufficient. But I also respectfully submit
12 that with an issue of this importance in the policy
13 that -- that the State of Tennessee Legislature has
14 set out, it is entirely within this Court's
15 discretion to allow a supplemental affidavit that
16 adds literally one sentence to this process. The
17 relationship I describe in this affidavit extends
18 back to 2007; or the contracts that are -- that have
19 been filed in this record, although the names might
20 be stated differently in the contract, it -- we
21 followed it as Saint Thomas Outpatient Neurosurgical
22 Center and its previous iterations.

23 So if Your Honor believes that the
24 record is not sufficient to establish the time frame
25 of this relationship, then I respectfully submit

1 that a supplemental affidavit as to what's already
2 in the record is entirely proper in this situation,
3 especially considering we have been on a very
4 compressed time frame.

5 THE COURT: I'm aware of that.

6 MR. TARDIO: We've answered literally
7 hundreds of requests, when you combine the two --
8 the four sets, but times three lawsuits that we're
9 answering discovery in. So if Your Honor wishes the
10 record to be clear, I'm more than willing to have an
11 affidavit go in the record by this afternoon.

12 THE COURT: Well, I think it's to
13 everybody's benefit, always, for the record to be
14 clear --

15 MR. TARDIO: Sure.

16 THE COURT: -- as possible in any case.

17 Okay. Well, let's do this: Let's see
18 what we can do with the -- if anything. I mean,
19 I've -- I've looked through them all. I can't
20 remember how many of these objections referred to
21 the privilege. I think a lot of them do. But maybe
22 we can solve some of those that don't.

23 MR. TARDIO: Mr. Nolan may correct me,
24 but I think that the privilege -- the pharmacist
25 privilege is certainly one of four or five issues

1 that permeate the responses. So if the Court wishes
2 to move on, I think that we could take up some of
3 the other ones and address them.

4 THE COURT: While -- while we're here,
5 I want to do something, if we can do it.

6 MR. NOLAN: I think we're -- I think
7 there's a lot we can do, Your Honor.

8 THE COURT: Okay. Good. Well, let's
9 do that.

10 MR. NOLAN: So I take it the Court is
11 going to -- is -- the Court's going to take the
12 pharmacist privilege issue under advisement at this
13 point?

14 THE COURT: Yes. And I -- I would --
15 how long will it take for you to get a supplemental
16 affidavit?

17 MR. TARDIO: I think we'll be able to
18 do it this afternoon. I'm told Ms. Schamberg is at
19 home sick. But, you know, she signed this one over
20 the weekend.

21 We've -- we've been bothering her with
22 a lot of things on these discovery requests, so I
23 think we can get a supplemental affidavit.

24 THE COURT: Okay. And I don't know
25 that that totally solves the Plaintiffs' position,

1 but it might help at least fill that gap that I
2 believe is there in the record.

3 And I know, Mr. Tardio, you made a
4 statement as an officer of the Court, what you said,
5 and I -- I -- you know, I respect that, and I have
6 no reason to doubt anything you're saying. I just
7 think the record needs to be as clear as it can be
8 so we can move forward, based on what we do have in
9 the record versus a representation, which is
10 perfectly fine. But I think, given the import of
11 all this, we need to --

12 MR. NOLAN: Your Honor, here's the
13 problem.

14 THE COURT: -- dot the I's and cross
15 the T's.

16 MR. NOLAN: Ms. Schamberg did not sign
17 the first contract back in 2007, so I don't see --

18 THE COURT: How -- how do we know that?

19 MR. NOLAN: Well, it's not her name on
20 the document. If we look at the first contract, the
21 one --

22 THE COURT: Tina -- Tina Sullivan, yes.

23 MR. NOLAN: Yeah. That -- so
24 Ms. Schamberg's affidavit, very respectfully, can't
25 really tell us anything. I mean, the only contract

1 that she claims that she signed is the one dated
2 September 1st, 2012.

3 THE COURT: Which is totally redacted.
4 I can't make any sense of it.

5 MR. NOLAN: It's so totally redacted.
6 They don't give us the signature blocks, you know,
7 and it's after the fact. And Mr. Tardio has told
8 the Court that the record is sufficient.

9 So with all due respect, we think the
10 Court should make a decision based on what's before
11 it, because there's no reason for us to believe that
12 Ms. Schamberg can testify to anything about the
13 first contract. She didn't sign it.

14 THE COURT: Is -- if Defendants know --
15 and I know -- is Tina Sullivan still with the group?

16 MR. TARDIO: No. Ms. Schamberg took
17 her place as facility director.

18 THE COURT: Where is -- do you know
19 where Ms. Sullivan is?

20 MR. TARDIO: I don't know.

21 THE COURT: Okay.

22 All right. Well, let's -- let's do
23 what we can without going into a privilege issue at
24 this moment. And if we can get something cleared
25 up -- and, I mean, I really think something needs --

1 I mean, the affidavit needs to say more than just
2 the date. It needs to explain who Tina Sullivan is,
3 who she was, what -- what I've just been told.

4 I mean, all those things need to be --
5 and what -- what Saint Thomas Neurosurgical
6 Associates was and how -- what relationship that
7 entity has to the present entities at Saint Thomas
8 Outpatient Neurosurgical Center, LLC.

9 I mean, I -- I think it can be done if
10 it -- if they are, in fact, the same entities
11 with -- but we just don't have all that detail right
12 now in front of -- front of us.

13 So see what y'all can do about that.

14 MR. TARDIO: Yes, sir.

15 THE COURT: Okay. Thank you.

16 (At which time, Mr. Cline and Mr. Zini
17 departed the courtroom.)

18 THE COURT: Let's see what we can do on
19 the other issues.

20 MR. NOLAN: All right, Your Honor.

21 Your Honor, the next issue that I think
22 we can deal with is --

23 THE COURT: Yeah, and -- well, let me
24 say this --

25 MR. NOLAN: Yeah.

1 THE COURT: -- before we go any
2 further. Tell me why, Mr. Tardio, we -- we can't
3 know the name of the pharmacist consultant.

4 MR. TARDIO: Well, I -- I don't
5 think -- I don't know necessarily that the name -- I
6 think the name is probably privileged, under the
7 broad reading of the statute. I also think the name
8 is not reasonably calculated to lead to the
9 discovery of admissible evidence.

10 What -- the only thing you can get from
11 him, in theory, is information that is, by
12 statute --

13 THE COURT: But --

14 MR. TARDIO: -- inadmissible --

15 THE COURT: Yeah.

16 MR. TARDIO: -- inadmissible at trial.

17 So I understand that -- that the name
18 is not the grand issue here. Because I think even
19 if the Plaintiff has the name, they can't get any
20 information from him that's admissible. So --

21 THE COURT: Well, let -- okay. Let's
22 reveal his name. That would be the first order.
23 Just say who he is, or she.

24 MR. TARDIO: Is the Court ordering?

25 THE COURT: Yes.

1 MR. TARDIO: Michael O'Neal.

2 THE COURT: Okay. And spell O'Neal --

3 MR. TARDIO: Yes.

4 THE COURT: -- for the Court.

5 MR. TARDIO: N-E-A-L. O- --

6 THE COURT: Apostrophe?

7 MR. TARDIO: -- N-E-A-L.

8 THE COURT: And what -- do you have a
9 CV on him or anything?

10 MR. TARDIO: No. It will be
11 provided -- provided. He -- he works at Vanderbilt,
12 and on the side, he consults for area health care
13 providers.

14 THE COURT: Okay. If you could provide
15 his CV, and that would be -- I think that would be
16 helpful. I think -- I think all -- I think his name
17 is discoverable. You know, discovery in our state
18 is very broad. Just like -- just like
19 cross-examination in trial is very broad, discovery
20 is very broad. And I adhere to -- I'm going to do
21 my very best to adhere to what the law is in the
22 state. That's what I'm supposed to do, so that's
23 what I will do.

24 And so I -- I think that information
25 should be provided. And maybe that will lead to

1 something that's discoverable, and maybe it won't,
2 but we don't know until we have the information. I
3 mean, that would -- you -- y'all know what I'm
4 talking about.

5 All right. Let's see. I guess the --
6 I'm looking at the first Saint Thomas Outpatient
7 Neurosurgical Center response to Plaintiffs' First
8 Set of Interrogatories. That's the first one that's
9 attached to the Plaintiffs' Motion to Compel.

10 So is that -- that okay that we start
11 that way?

12 MR. NOLAN: Yeah, that's right. And I
13 think we've really dealt with that set, Your Honor.
14 We just attached Interrogatory No. 2, and that's the
15 one that withheld information about the pharmacist.

16 THE COURT: Yes.

17 MR. NOLAN: And we've also attached
18 Interrogatory No. 17, which deals with the same
19 issue. So I think we've covered -- I think we've
20 covered those two requests.

21 THE COURT: Well, but No. 2 says for
22 each communication. And the communication issue is
23 still a privilege issue.

24 MR. NOLAN: That's right.

25 THE COURT: Is that what you're saying?

1 We've covered it?

2 MR. NOLAN: That's right.

3 THE COURT: Okay.

4 MR. NOLAN: We've -- we've discussed
5 it, yes.

6 THE COURT: Discussed it.

7 When you say "covered," I thought we've
8 solved it. We have not solved it yet.

9 MR. NOLAN: No.

10 THE COURT: We've -- we've just
11 discussed it.

12 MR. NOLAN: That's right.

13 THE COURT: We put it on the burner for
14 a -- for a short time.

15 All right. And so then that moves us
16 on to Saint Thomas Outpatient Neurosurgical Center's
17 responses to Plaintiffs' First Set of Requests for
18 Production of Documents.

19 And that first one that's contested is
20 No. 25. There's a copy of all of Saint Thomas
21 Neurosurgical's written policies, procedures, and
22 guidelines.

23 MR. NOLAN: That's right. I'm happy to
24 address that, Your Honor.

25 THE COURT: Sure.

1 MR. NOLAN: You know, I've been doing
2 this for about 22 years, and generally the way it
3 works, when you have a med mal case and you ask for
4 the entity's policies and procedures, that's a
5 standard request. And the -- the Defendant produces
6 a big binder of policies and procedures, you go over
7 it with your little yellow stickies, and you review
8 those and designate the ones you want. And if, for
9 some reason, you designate one that the other side
10 wants to fuss about, then you can fuss about it.

11 But that's the way I've approached it
12 until -- until now. What's happened is that they
13 wouldn't -- you know, they haven't shown us all the
14 policies and procedures. What they have shown us is
15 the index for the policy and procedure book. And --

16 THE COURT: Does that help you at all?

17 MR. NOLAN: It did help. It helped.
18 We went through and we -- we designated -- you know,
19 they produced a few, and we designated 77 more that
20 we wanted. And they now, in their response, have
21 indicated that they're willing to give us 67 of the
22 77. And so we're now down to 10 that they haven't
23 produced.

24 And I just don't understand why we're
25 doing this, to tell you the truth. I mean, why

1 don't they just go ahead and show us the other 10?
2 I don't -- I don't -- I don't get it, Judge. I
3 mean, you know --

4 THE COURT: Well -- well, let's see --
5 well, go ahead.

6 MR. NOLAN: Well, if you look at -- at
7 page 15 of their brief, they give us a list of the
8 10 that they don't want to show us.

9 THE COURT: Yes.

10 MR. NOLAN: Okay. Most, if not all, of
11 those, Your Honor, are discoverable. I mean, they
12 could lead to the discovery of admissible evidence.

13 The first one is HRO7, "Staff Rights
14 and Ethical Dilemmas in Patient Care." Maybe --
15 maybe there were some ethical dilemmas, Your Honor,
16 that were created by this firestorm fungal
17 meningitis outbreak. I don't know what the
18 procedure says, but we'd sure like to see it. The
19 rules of discovery are broad.

20 The second one is IC14, "Infection
21 Control 14, Standard Precautions." A lot of people
22 got meningitis infections, Judge, so the standard
23 precautions in the infection control part of the --
24 of the manual may bear on this.

25 IC18, "Universal Precautions." Same

1 deal, Judge. I mean, that could lead to the
2 discovery of admissible evidence.

3 IMO7, "Community Resources." I don't
4 know what that's about, Your Honor. I don't know
5 what it's about because I haven't seen it. I just
6 don't know why they're making us go through that. I
7 mean, it would be so much more efficient and less
8 expensive if they just let us see these things,
9 reserving all objections as to admissibility at
10 trial.

11 The next one is "Assessment Prior to
12 Induction." That -- that may not apply, Judge.

13 The next one is "Anesthesia Services."
14 Well, Judge, Dr. Culclasure, the medical director
15 for -- for Saint Thomas Neurosurgical, he's an
16 anesthesiologist, and he's the guy who was giving
17 these shots. So this very well may have some useful
18 information.

19 Same with the next one, "Anesthesia
20 Responsibilities."

21 The next one about security, Your
22 Honor, I don't know -- I don't know what that says,
23 whether it has any bearing on this.

24 But certainly the next one,
25 "Communication," very well may have a bearing on

1 this because, Your Honor, there's a big issue in
2 this case about whether there was an unreasonable
3 delay to notify these people that they had received
4 contaminated shots. And it's -- one of our theories
5 is that if they had told Diana Reed, on
6 September 20th when they shut Saint Thomas
7 Neurosurgical down, that the shots that she received
8 were being recalled so that she could get in and get
9 antifungal treatment, she would be alive today. But
10 instead, three critical days went by, and now she's
11 not with us anymore.

12 So communication, Judge, there was a
13 big failure of communication in this case. We think
14 we're entitled to that policy and procedure.

15 "Pastoral Care," I don't know why we
16 highlighted that one, but I don't think that is
17 germane to this.

18 But, Your Honor, we think we're
19 entitled to all the ones I've mentioned. And we
20 just -- you know, we don't understand why this is so
21 difficult and time-consuming.

22 THE COURT: All right. Mr. Tardio?

23 MR. TARDIO: This suggestion that we
24 haven't been cooperative in producing policies and
25 procedures is entirely wrong. We've produced

1 eighty- -- 82, I think -- 82 policies and
2 procedures. 77 were -- we produced 5 voluntarily,
3 said these clearly apply, if my numbers are correct.
4 They requested either 67 more or 77 more, which we
5 will copy and produce. And we're down to these 10,
6 which I'm holding in my hand. They just don't apply
7 here. They're not relevant and they're not -- not
8 discoverable.

9 And I have a responsibility to my
10 client to not say, "I just turned it over. I know
11 it doesn't have anything to do with this, I know
12 that it's not relevant, and I know -- I know that
13 it's not reasonably calculated to lead to the
14 discovery of admissible evidence, but I just turned
15 it over."

16 These don't apply. They're not
17 relevant. They're not discoverable. That's the ten
18 that we're down to, and this is -- this is it. I'm
19 willing to submit them for an in camera review. If
20 Your Honor says they're discoverable, hand them
21 over. But I don't -- I respectfully disagree that
22 the answer to this objection is just to let the
23 Plaintiff see them and decide whether they want
24 them.

25 MR. NOLAN: I guess, from our

1 perspective, there's no reason for in camera review
2 because there's no assertion of a privilege as to
3 these policies and procedures.

4 THE COURT: All right. The Plaintiffs
5 are conceding you don't need "Pastoral Care"?

6 MR. NOLAN: Yes.

7 THE COURT: All right. Defendant will
8 provide 1 through 9 of the additional policies and
9 procedures that Plaintiff has requested, and
10 request, in addition, No. 25.

11 Discovery is broad and you've got to
12 turn it over.

13 All right. Let's see. Next number
14 that is contested is No. 32: "Request to produce
15 all external communications between Saint Thomas
16 Neurosurgical and any other person or entity
17 relating to Nashville" -- I'm sorry. What -- oh,
18 I'm sorry -- "NECC's recall of MPA" -- which is
19 the -- which is the injection material, correct?

20 MR. NOLAN: Yes.

21 THE COURT: -- "and/or the recent
22 fungal meningitis outbreak."

23 And the objection is: Overly broad.

24 Is this -- does this have to do with
25 e-mails that -- that we've talked about?

1 MR. NOLAN: It does have to do with
2 e-mails --

3 THE COURT: All right.

4 MR. NOLAN: -- and --

5 THE COURT: And there are numerous
6 e-mails, correct?

7 MR. NOLAN: Here's -- here's kind of
8 where we are on that issue. Yesterday we got an
9 affidavit that they filed from an IT person in
10 Saint Thomas Neurosurgical saying that 15,000
11 e-mails have been segregated. We don't know how
12 they were segregated or, kind of, what's included in
13 those.

14 But, Your Honor, for purposes of moving
15 forward with these depositions, we really think
16 there are four key players whose e-mails should be
17 scrutinized. And those four players are
18 Dr. Culclasure, Nurse Schamberg, Scott Butler, and
19 also Nurse Littleton, who is mentioned in
20 Saint Thomas Neurosurgical's discovery responses.
21 So --

22 THE COURT: What -- I'm sorry. What
23 was the last name again?

24 MR. NOLAN: Ms. Littleton, I believe it
25 is.

1 THE COURT: Nurse?

2 MR. NOLAN: Nurse.

3 And if you just take those folks'
4 e-mails, you're going to reduce the number way below
5 15,000. And we think, under the circumstances,
6 given that so many people have died and gotten sick,
7 requiring the Defendant to go through the e-mails of
8 those four people and produce to us what's
9 discoverable is -- is reasonable, Your Honor.

10 And that's -- that's the way we suggest
11 the Court should narrow this issue down so that we
12 can get on with discovery.

13 THE COURT: Okay. Yes, Mr. Tardio?

14 MR. TARDIO: I'm not sure how many
15 e-mails we're talking if we narrow it down to four.
16 We preserved -- we preserved all the STOPNC
17 employees' e-mails from -- I can't remember the
18 starting date. I think it's in the affidavit, or
19 maybe it's in the papers -- up through essentially
20 the present. That's what we did. And that's what
21 got 15,000 e-mails.

22 Now, certainly, a lot of those are
23 going to deal with the fungal meningitis outbreak, a
24 lot of e-mails sent from September 2012 forward at
25 that center that deal with it. So I don't know that

1 it's as easy as saying, "Well, let's just look
2 through these four people."

3 Is that better than 15,000? Sure. But
4 it may still be 2- or 3,000.

5 And -- and I'm not -- my argument, Your
6 Honor, is, I'm not representing to the Court that
7 there aren't discoverable communications in there.

8 THE COURT: No, I understand.

9 MR. TARDIO: But I am representing to
10 the Court that it is a substantial burden, costly,
11 and time-consuming --

12 THE COURT: I understand.

13 MR. TARDIO: -- to go through them.
14 And all I'm asking for is some protection, some
15 guidance on how to do that. Because I want to
16 comply with my obligation, but I also don't want to
17 tell one of our younger lawyers or somebody at
18 STOPNC that they need to sit in a room for the next
19 month and go through e-mails eight hours a day,
20 because I don't think that's what the Rules
21 contemplate.

22 THE COURT: When are depositions
23 scheduled, again? June 4th?

24 MR. NOLAN: June 4th.

25 MR. TARDIO: 5th, and 6th.

1 THE COURT: I'm sorry?

2 MR. TARDIO: 4th, 5th, and 6th.

3 MR. NOLAN: June 4th.

4 THE COURT: 4th, yeah.

5 MR. TARDIO: And we have -- we have
6 produced some e-mails. We've produced the ones that
7 are clearly -- clearly apply. We've produced the
8 ones that mention Diana Reed, for instance. We've
9 produced the communications with NECC. We've
10 produced the communications related to the decision
11 to purchase from NECC. So this is not obstinate.
12 It's not obstructive. It's simply --

13 THE COURT: No, it's -- it's a
14 time-consuming cost issue. I understand that.

15 MR. TARDIO: Yes, sir. Uh-huh.

16 So I don't profess to have the
17 solution, but I can tell you that it is an issue,
18 and I think it's a valid objection that, as worded,
19 the -- the request is too broad and too burdensome.

20 THE COURT: All right. What about the
21 protection that we talked about at the beginning, of
22 Rule 1200-14-1-15(2)?

23 MR. TARDIO: I think that's going to
24 make them confidential. I don't know that -- I
25 don't think it makes them nondiscoverable.

1 THE COURT: Nondiscoverable? I see.

2 MR. TARDIO: So I don't know that they
3 can make it onto the -- outside the confines of this
4 litigation. We might have to enter into a
5 protective order, --

6 THE COURT: Yes.

7 MR. TARDIO: -- but that's an issue
8 that we need to deal with.

9 THE COURT: See if -- see if you-all
10 can -- see if you can find where that (2) is or is
11 not, if it -- if it just -- well, I don't -- there's
12 no -- no way to tell what happened. And you don't
13 have an explanation right now what happened?

14 MR. TARDIO: No. We've been looking
15 for (2). It existed when we drafted the responses,
16 I can assure the Court.

17 THE COURT: So if that's an issue -- if
18 you can find the (2), and that becomes an issue for
19 protection, you-all -- you-all talk about that and
20 see if you can agree on it. And if (2) does exist
21 and it does say it's protected, then, I mean, if it
22 says that --

23 MR. TARDIO: Sure.

24 THE COURT: -- then it ought -- there
25 ought to be a protective order entered.

1 MR. TARDIO: I agree. And I think
2 that's something we'll be able to agree on.

3 THE COURT: Okay.

4 MR. TARDIO: But I'm not prepared to
5 simply agree to go through all of Debra Schamberg's
6 e-mails, all of Sandy Littleton's e-mails, all of
7 Dr. Culclasure's e-mails, and all of -- was it
8 Dr. Lanford --

9 MR. NOLAN: Butler.

10 THE COURT: No.

11 MR. TARDIO: Oh, Scott Butler's
12 e-mails.

13 THE COURT: Scott Butler.

14 All right. I understand.

15 MR. TARDIO: But I -- you know, if Your
16 Honor wants to, we can run search terms. I'm not
17 sure what the best way to do it is, frankly.

18 THE COURT: And search terms for the
19 e-mails involving Dr. Culclasure, Nurse Schamberg,
20 Scott Butler, and Nurse Littleton.

21 MR. TARDIO: I think what we would do
22 is run search terms within these four -- what we did
23 is segregate the accounts. So we went in and we
24 have all of Dr. Culclasure's e-mail accounts.

25 THE COURT: Yes. Yes. Good.

1 And maybe they -- the Plaintiffs can --
2 can specify -- what I thought you meant by "search
3 terms" is maybe -- maybe look for some words in
4 those e-mails --

5 MR. TARDIO: That's what I meant.

6 THE COURT: -- that would even narrow
7 the scope even further.

8 MR. TARDIO: Yes, sir.

9 THE COURT: Is that something the
10 Plaintiffs could do? Or is it just, you just don't
11 know enough to be able to say that right now?

12 And you may not know. This -- this is
13 discovery --

14 MR. NOLAN: Your Honor, I don't want to
15 take that idea off the table. But I guess the point
16 I would make is, this is the tip of the iceberg. I
17 mean, these folks are about to be hit with an
18 avalanche of litigation. And these e-mails are
19 going to have to be produced. You know, this is
20 work that's going to have to be done. And requiring
21 the Defendant to review the e-mails of those four
22 people is just not an unreasonable burden under
23 these circumstances.

24 THE COURT: I understand.

25 MR. TARDIO: It is before June 4th.

1 And that's what we're -- that's one of the problems
2 we're dealing with --

3 THE COURT: Yes.

4 MR. TARDIO: -- going through. You
5 know, several thousand e-mails over a several-month
6 period is not nearly as daunting as -- I mean,
7 obviously, there are tons of HIPAA issues in here
8 where other patients are mentioned. Obviously,
9 there are a ton of attorney/client communications
10 that are going to need to be weeded out or redacted,
11 so . . .

12 MR. NOLAN: What if we do this, if I
13 could make a suggestion.

14 THE COURT: Sure.

15 MR. NOLAN: I think it would make sense
16 for Mr. Tardio to first ascertain how many e-mails
17 are included in the universe of those four people.

18 THE COURT: Yes.

19 MR. NOLAN: Could be a smaller number
20 than we anticipate.

21 THE COURT: Yes.

22 MR. NOLAN: And -- and then, if the
23 number is still unmanageable, then we can talk about
24 search terms. And maybe we can collaborate on a
25 list of search terms that would further restrict the

1 universe of e-mails. That's the way I would suggest
2 that we approach it.

3 THE COURT: Well, I think that's a good
4 suggestion. And I -- the information is
5 discoverable. And as you -- as you rightly point
6 out, Mr. Nolan, they're going to have to do it.
7 You're just the first to ask. They're going to have
8 to do it for other lawsuits that are pending, a
9 litigation that might be -- might come about. So I
10 don't -- I don't think it's an unreasonable request.

11 I'd be glad to entertain a cost/time
12 issue later, maybe, on a lot of this. And this is
13 not -- this is not the only one, I'm sure, that's
14 going to involve time and cost, so I'll be glad to
15 entertain that later.

16 But let's do our best to get it --
17 Defendants do their best to get that together as
18 quickly as they can for Dr. Culclasure, Nurse
19 Schamberg, Scott Butler, and Nurse Littleton. And
20 then see if you-all can -- the Plaintiffs' and
21 Defendants' counsel get together and maybe do search
22 terms on those. If the Plaintiffs want to do that.
23 I'm not requiring you to do that. Because I -- I
24 just think -- I mean, you're shooting in the dark
25 because you don't know what's there, so you might be

1 better off just getting the information, sifting
2 through it, and then determining what you think is
3 important for your case.

4 I mean, after all, this is discovery.
5 A lot of things that are learned in discovery are
6 not admissible at trial. We all know that, so --
7 but, you know, discovery, one more time, is -- it
8 means what the word connotes: You can discover and
9 learn. A lot of it may not be ultimately anything
10 that ever comes out at trial, but it gives you
11 information to help you form trial strategy, maybe
12 find other information that might be admissible at
13 trial. I mean, there's just a lot of things that
14 discovery allows litigants and their attorneys to
15 do. So that information will be provided by Defense
16 Counsel.

17 All right. No. 33: Produce all
18 communications between Saint Thomas Neurosurgical
19 and Tennessee Department of Health, FDA, CDC, and/or
20 any other governmental entity relating to NECC's
21 recall of MPA and/or the recent fungal meningitis
22 outbreak.

23 Same objection: Broad, time-consuming,
24 thousands of documents and, again, the protection
25 issue.

1 So how many thousands of documents on
2 this -- on this one?

3 MR. TARDIO: It's -- I mean, it's the
4 same issue. We captured the universe of all e-mails
5 sent by any --

6 THE COURT: It's 15,000, still?

7 MR. TARDIO: That's the estimate.

8 THE COURT: Estimate, yes.

9 MR. TARDIO: Howell Allen -- and I'm
10 sure the Court's already picked up on this.

11 Howell Allen lent its employees to
12 STOPNC, so it was -- there's a finite number of
13 STOPN- -- people working at STOPNC. Finite number.
14 I think, it's 12, 14, something like that.

15 We preserved all their e-mails, all of
16 them. Whether it's, "Can you pick up Johnny from
17 softball," or all the way -- you know, anything that
18 they sent or received.

19 THE COURT: Yeah.

20 MR. TARDIO: And that's the 15,000
21 number, so . . .

22 THE COURT: Well, if we do the same --
23 same rule, same guidelines, Dr. Culclasure and Nurse
24 Schamberg, Scott Butler, Nurse Littleton, is that --
25 would that be acceptable, Plaintiffs?

1 MR. TARDIO: I'll ascertain how many
2 that is.

3 THE COURT: Just see how many that is,
4 and then try to get them together and provide them
5 as quickly as you can.

6 Okay. Let's see. The next one that's
7 got an objection is No. 66, Request to Produce 66:
8 Produce all photographs taken in connection with
9 NECC's recall and/or the fungal meningitis outbreak,
10 including, but not limited to, photographs of any
11 NECC products or Saint Thomas Neurosurgical's
12 facilities.

13 Objection: Protected from discovery by
14 the work product doctrine and attorney/client
15 privilege. Any photographs taken by counsel or at
16 the instruction of counsel are privileged from
17 discovery.

18 What do the Plaintiffs say?

19 MR. NOLAN: Your Honor, I've never
20 encountered a work product objection for photographs
21 before. I mean, it's our respectful position that
22 photographs are facts, and they should be produced.
23 You know, to the extent that the -- that it could be
24 characterized as work product, if you look at the
25 "Boyd vs. Comdata" decision, it makes it very clear

1 that if work product falls within the category of
2 what they call fact or ordinary work product, it's a
3 very low threshold that a requesting party must meet
4 in order to get the information. And that is to
5 show that there's a substantial need for the
6 information and they can't get it through other
7 means.

8 Judge, this is the only way we can get
9 these photographs. I mean, we can't walk into
10 Saint Thomas Neurosurgical and start taking
11 pictures.

12 So, Your Honor, I've just never had
13 anybody withhold photographs based on the work
14 product doctrine. They should just show us the
15 photographs, give us copies, and reserve any
16 objections as to admissibility.

17 THE COURT: Well, "Boyd vs. Comdata
18 Network," 88 S.W.3d 203, it's the case law -- well,
19 it's Court of Appeals, Middle Section, 2002. Judge
20 Koch, now Justice Koch, wrote that opinion. It is
21 the case law on work product doctrine, waiver,
22 common defense privilege. I mean, it's everything
23 wrapped into one, --

24 MR. NOLAN: Yeah.

25 THE COURT: -- as Judge Koch is very

1 good at doing. And he does say: "To obtain
2 ordinary or fact work product" -- we don't have any
3 mental impressions or photographs of the -- of the
4 attorneys, so it's work -- it's fact work product,
5 ordinary or fact work product -- "the requesting
6 party must establish (1) that it has substantial
7 need for the materials and (2) that it is unable to
8 obtain these materials or their substantial
9 equivalent by other means without undue hardship."

10 Okay. Mr. Tardio? And you can -- you
11 can just do it right there, if you want to.

12 MR. TARDIO: Okay. Thank you, Judge.

13 THE COURT: Sure.

14 MR. TARDIO: All "Boyd" said -- well,
15 first off, I respectfully disagree that photographs
16 cannot set out mental impressions of attorneys.
17 Certainly, what you choose to take photographs of
18 and how you choose to take the photographs
19 absolutely can signal what is important, what you
20 felt was important, what part of whatever you're
21 taking pictures of is important.

22 THE COURT: I agree. But -- but you
23 can't be asked why you think that's important.
24 That's the mental impression that you can't -- that
25 they cannot discover. And --

1 MR. TARDIO: After this happened, we
2 sent one of our lawyers out to STOPNC to take
3 photographs: "Take photographs of anything you
4 think is important that we need to preserve to
5 prepare for litigation."

6 That's exactly what work product is
7 intended to protect: tangible documents or tangible
8 things created by or for the party, or the party's
9 representative in this case, in anticipation of
10 litigation.

11 So it -- I think that the work product
12 privilege doctrine applies. I do.

13 Now, the flip of that is, can the
14 Plaintiff or the opposing party obtain the
15 substantial equivalent via other means of discovery?

16 They're going to have the opportunity
17 to ask Ms. Schamberg, Dr. Culclasure, and Scott
18 Butler anything they want about STOPNC. Anything
19 they want -- I mean, not anything they want:
20 anything that could be captured in these
21 photographs.

22 So I don't think that they made the
23 showing before the depositions that they can't get
24 the substantial equivalent via testimony.

25 THE COURT: Well, generally, the

1 substantial equivalent issue involves written
2 statements by witnesses in anticipation of
3 litigation. And I really have not seen this issue
4 raised before. That doesn't mean it's not a proper
5 issue to raise, though, where photographs are deemed
6 to be -- or claimed to be work product.

7 So -- and I guess the other issue that
8 comes to my mind is, what if I say, okay, the
9 Plaintiffs can go out to the facility and take their
10 own photos. Are the -- is the facility the same now
11 as it was then? If it's not, then you can't obtain
12 a substantial equivalent.

13 MR. NOLAN: I assume they don't use the
14 same medicines and vendors. I mean, you know, I
15 don't think it would be the same, Your Honor.

16 THE COURT: It's hard to know whether
17 it is or is not. But that -- that would be the only
18 way to obtain the substantial equivalent on
19 photographs if, in fact, photographs are actually
20 work product. And I'm not sure they are. I'm just
21 saying, if they are, how do you obtain the
22 substantial equivalent? The only other way is to go
23 out and take your own photographs.

24 And y'all will give permission for them
25 to do a walk-through? Have you --

1 MR. TARDIO: We haven't even addressed
2 it. We haven't even talked about it.

3 THE COURT: Okay. Well, go ahead,
4 Mr. Nolan. What's your -- really, I guess, the real
5 issue, first of all, is: Is it work product? Are
6 photographs work product?

7 MR. NOLAN: Well, Your Honor, --

8 THE COURT: Photographs --

9 MR. NOLAN: -- under -- under --

10 THE COURT: It's like photographs of a
11 vehicle in an automobile wreck case. I mean, that's
12 the only thing I can akin it to at this moment. But
13 everybody's interested in that, both sides. Nobody
14 ever claims privilege, but most of the time, the
15 photograph is of some assistance.

16 But, anyway, go ahead.

17 MR. NOLAN: We don't think photographs
18 are work product. And certainly, they don't contain
19 mental impressions. We have a substantial need, and
20 there's really no other way we can get the
21 information contained in those photographs, because
22 they were taken, apparently, shortly after the
23 outbreak.

24 THE COURT: All right. Well, here we
25 go. Court's ruling: After review of "Boyd vs.

1 Comdata," I find that the photos are not work
2 product. But if they are, the only way to -- well,
3 it's hard to establish a substantial need or an
4 inability to obtain the materials. It's really --
5 that's a difficult burden a lot of times, but I
6 think that it -- at this juncture, even if it is
7 work product, that the Plaintiff has established
8 they have a substantial need. And it's twofold:
9 Substantial need for photos and unable to obtain the
10 materials on their own or the substantial equivalent
11 by other means without undue hardship.

12 And I don't know -- it seems to me
13 things change in a facility. And there's probably
14 at least one -- I don't know how many photographs
15 we're talking about, but I bet -- I'll bet there's
16 at least one that -- or more that capture images
17 that are -- that were different then than they --
18 than they are now. And there's no way to -- for the
19 Plaintiff to obtain substantial equivalent unless
20 they do a walk-through and do their own photographs
21 in the facility.

22 The photographs -- the images taken by
23 the -- depicted by the photographs could very easily
24 have changed.

25 So that's the Court ruling.

1 All right. And the next -- I think
2 then we -- then we move on to the Howell Allen
3 Professional Corporation's responses to
4 interrogatories and the objections to those.

5 And the first one, first objection by
6 the Defense is to Interrogatory Question 2, which
7 is: Has Howell Allen Clinic ever purchased
8 medication from a compounding pharmacy? If so,
9 identify the name of the compounding pharmacy, the
10 name of the medications purchased, reason for
11 procuring the medication from the compounding
12 pharmacy, and the price per dose of each medication
13 purchased.

14 Defendants' response is:

15 Objection, overly broad and unduly
16 burdensome.

17 Let's see.

18 Medications purchased by Howell Allen
19 that are irrelevant to the claims form the basis of
20 this complaint that the relevant purchases were made
21 by STOPNC -- which is the other entity that we've
22 just discussed. And I guess this is alter ego
23 issues.

24 MR. NOLAN: That's right.

25 And, Your Honor, I'd like to show the

1 Court something about that, if I could. Your Honor,
2 as the Court observed, we've -- you know, we allege
3 that Howell Allen and Saint Thomas Neurosurgical are
4 alter egos. And here's what we've established
5 through a request for admissions that we filed with
6 the Court yesterday.

7 Everyone who was working over there at
8 Saint Thomas Neurosurgical was a Howell Allen
9 employee, and that includes Dr. Culclasure, the
10 medical director, as well as Nurse Schamberg, the
11 facilities director.

12 And, Judge, they didn't maintain an
13 arm's-length relationship between these two
14 entities, Your Honor, and I say that because they --
15 they produced documents to us that state that
16 Saint Thomas Neurosurgical is, in fact, part of
17 Howell Allen. And let me show you what I'm
18 referring to.

19 Your Honor, this is one of the policies
20 and procedures that Saint Thomas Neurosurgery did
21 produce. This is an internal document. We can see
22 what it says. So it says very plainly, Your Honor,
23 Saint Thomas Neurosurgical is part of Howell Allen.
24 That's what they say internally. And that is
25 consistent, Your Honor, with what Howell Allen tells

1 its patients.

2 This is a brochure that Howell Allen
3 gave to Diana Reed. And you can see that it lists
4 its several various office locations, including
5 Saint Thomas Hospital. And when you look at the
6 next page, Judge, it has a list of all these
7 different Howell Allen locations, and we can see
8 that Saint Thomas Outpatient Neurosurgery Center is
9 on the list. That's what they hold themselves out
10 to the public. They say, "This is part of us. This
11 is part of the Howell Allen Clinic."

12 Your Honor, another interesting pair of
13 documents are these two (indicating). Your Honor,
14 on our -- on the left, we have a -- one of the bills
15 that Saint Thomas Neurosurgical sent for Mrs. Reed's
16 care. And you see it's got the address, and it's
17 also got the phone number.

18 Now, on the right, we have Howell
19 Allen's Website. And when we look at what phone
20 number Howell Allen lists, we see it's the same
21 phone number. So they have an integrated telephone
22 system. We also know, from the e-mails that have
23 been produced, that people like Ms. Schamberg use a
24 Howell Allen e-mail address.

25 So, Your Honor, it's our very

1 respectful position that there's a lot of proof --
2 and we haven't even taken any depositions yet, but
3 we've already got a lot of proof to show that
4 Saint Thomas Neurosurgical and Howell Allen are --
5 they're one and the same. And it's for that reason,
6 Your Honor, that we think we're entitled to full
7 discovery from Howell Allen. They're represented by
8 the same law firm, for goodness' sake.

9 But, Your Honor, more specifically to
10 the question that's before the Court, this question
11 asks whether Howell Allen uses this particular
12 steroid, MPA, methylprednisolone acetate; and if so,
13 where do they get that stuff?

14 That's directly relevant to the
15 standard of care, Your Honor. If Howell Allen was
16 buying its MPA from Pfizer, an FDA-approved and
17 regulated product manufacturer, that's very, very
18 important in this lawsuit. Howell Allen owns part
19 of Saint Thomas Neurosurgical, along with
20 Saint Thomas Network.

21 So what those other entities do as far
22 as purchasing steroids from compounders or not
23 purchasing steroids from compounders is directly
24 relevant to the issue of the standard of care, and
25 we think we're entitled to that information.

1 THE COURT: Mr. Tardio?

2 MR. TARDIO: Your Honor, I'll just
3 direct you to 48 -- I think it's 48-217-101. This
4 is what will govern Howell Allen's purported
5 liability in this case.

6 Howell Allen is a member of STOPNC, as
7 is Saint Thomas. Section 48-217-101(2) specifically
8 says that a member is not going to be personally
9 liable for the actions of the -- that's what we have
10 the limited liability company statute for. And I
11 respectfully submit that a common phone number on a
12 Website, a map handed to patients, and an internal
13 infection control policy doesn't trump the
14 long-standing limited liability rule.

15 So that's the overarching objection to
16 this unfettered discovery of Howell Allen.

17 THE COURT: All right. Well, let me --
18 let me ask you this. And I -- I'll let you continue
19 to argue if I'm not on point on this.

20 But what if that same interrogatory
21 question were asked of Saint Thomas Outpatient
22 Neurosurgical Center, LLC?

23 MR. TARDIO: They asked it, and we
24 answered it.

25 THE COURT: If they ask, you would

1 answer?

2 MR. TARDIO: They did ask, and we did
3 answer.

4 THE COURT: All right. Now, back to
5 the Plaintiff.

6 Did you get -- you didn't get the
7 information you needed from that response?

8 MR. NOLAN: Well, Your Honor, we know a
9 lot more now about where Saint Thomas Neurosurgical
10 bought its steroids. But what we're asking about is
11 where Howell Allen Clinic bought its steroids.
12 That's what this question is about.

13 And, you know, the standard of care in
14 this medical community is an issue, and what that
15 standard of care required. And Howell Allen Clinic,
16 in addition to owning part of Saint Thomas
17 Neurosurgical and also supplying all the employees
18 for that entity, they're a member of the medical
19 community. And what they do as far as buying
20 steroids is hugely relevant, even -- even if -- if
21 the Court ultimately decides that they are, in fact,
22 a separate entity. You know, that's really an issue
23 for another day.

24 THE COURT: I -- I think so, too. I
25 looked at -- looked at your brief on that and

1 reviewed the case law on that, and I really -- I
2 really believe that alter ego issue is an issue for
3 another day.

4 Is that what you're talking about?

5 MR. NOLAN: Yeah, it's an issue for
6 another day.

7 THE COURT: That's what I thought, too.
8 It's really back to relevance. And really,
9 relevance can't be determined until you have the
10 information. So I'm going to order the information
11 be provided.

12 MR. TARDIO: Your Honor, let me make
13 one statement.

14 THE COURT: Go ahead.

15 MR. TARDIO: I understand the ruling
16 that there is relevant information within
17 Interrogatory 2, and I understand that's the ruling
18 of the Court.

19 There's no time frame on this. There's
20 no limit to methylprednisolone acetate or other
21 injectable steroids. I mean, conceivably, if they
22 bought an antibiotic ointment in 2000 or 1998 in
23 its -- in the Kentucky office --

24 THE COURT: Yeah, it has nothing to do
25 with anything. I understand.

1 MR. TARDIO: Well, it's also --

2 THE COURT: Can -- can you-all narrow
3 it a little bit?

4 MR. NOLAN: I would -- I would suggest
5 narrowing it going back five years and limiting it
6 to steroids.

7 THE COURT: How does that sound,
8 Mr. Tardio?

9 MR. TARDIO: Not -- without waiving any
10 objection I've stated to the Court or stated in the
11 papers. I understand the ruling.

12 THE COURT: Okay. Let's do it that
13 way.

14 So, again, what's the time frame? Five
15 years from what date?

16 MR. NOLAN: Five years from October
17 the 1st of 2012. That's when the outbreak roughly
18 was -- became public knowledge.

19 THE COURT: All right. And then -- and
20 what was the medication limitation, did you say?

21 MR. NOLAN: Steroids.

22 THE COURT: Just steroids?

23 Okay. That would be the Court's order,
24 with that qualification, because that does narrow
25 the scope for the Defendants.

1 All right. Now we're moving to the
2 Howell Allen responses to Plaintiffs' First Set of
3 Requests for Production. Let's see. First
4 objection is to Request No. 13.

5 Request 13 is: Produce a copy of all
6 e-mails, protocols, procedures, memoranda,
7 guidelines and/or correspondence related to
8 notifying or contacting patients who received
9 steroid injections obtained from NECC.

10 Howell Allen objects on the grounds it
11 seeks information protected by the work product,
12 attorney/client, Tennessee Peer Review Law, all
13 privileges, Tennessee Code Annotated
14 Section 63-6-219, Tennessee Patient Safety and
15 Quality Improvement Act. Additionally, it's
16 overbroad, unduly burdensome. Numerous
17 communications after the fact with patients
18 potentially exposed to contaminated product.
19 Request essentially seeks all communications, an
20 obviously, overbroad and unduly burdensome request.

21 Okay. If we eliminate the -- well,
22 eliminate -- let me start over -- narrow the
23 question so that we're not requesting information
24 that's potentially privileged under the Tennessee
25 Peer Review Law of 1967 and the Tennessee Patient

1 Safety and Quality Improvement Act of 2011, what
2 other -- I mean, if you've got a work product
3 doctrine and attorney/client privilege, you need to
4 do a privilege log on all that. Maybe hadn't had
5 time to do that. I don't know.

6 MR. TARDIO: This is the same -- same
7 e-mails we're talking about, the same set of
8 e-mails.

9 THE COURT: Okay.

10 MR. TARDIO: So the privilege will be
11 within these e-mails. And the burden and breadth of
12 going through these e-mails and redacting privileged
13 information, you know, this is -- we're not talking
14 about 20 e-mails here.

15 THE COURT: What about -- let's go to
16 protocols, procedures, memoranda, guidelines. Is
17 that -- that's less broad.

18 MR. TARDIO: You're talking about -- we
19 still on 13?

20 THE COURT: Yes, sir.

21 MR. TARDIO: The second half of it?

22 THE COURT: It's a copy of all e-mails,
23 common protocols, common --

24 MR. TARDIO: Well, I assume this is
25 asking for policies and protocols related to

1 notifying patients? Is that what it's asking for?

2 MR. NOLAN: (Nods head.)

3 MR. TARDIO: I think those, if they
4 have any, are discoverable.

5 THE COURT: All right.

6 MR. TARDIO: This interrogatory
7 request, I guess it is, is just so broad that it's
8 literally anything written by anybody at Howell
9 Allen, ever.

10 THE COURT: No, I understand. But
11 limiting it to the question right now, to protocols,
12 procedures.

13 And I don't know what memoranda maybe
14 you're talking about, Mr. Nolan. What would you say
15 that would be or could be limited to? Maybe you --
16 maybe you don't know.

17 MR. NOLAN: Well, basically, if
18 there -- if there was stuff that they were sending
19 by e-mail or letter about contacting people who
20 received injections from NECC, you know, that's the
21 real limitation. So, you know, it wouldn't go far
22 back in time. It would only go back to, I guess,
23 September 18th, at the very earliest, and . . .

24 THE COURT: Of what year?

25 MR. NOLAN: Of 2012.

1 Because at some point, a decision was
2 made, "We need to start telling patients about
3 this." And we just want to pick up documents and
4 e-mails that -- that were part of that process.

5 MR. TARDIO: Well --

6 THE COURT: 2012 -- September 18th,
7 2012, forward?

8 MR. NOLAN: That's right.

9 MR. TARDIO: Just for context here:
10 After the outbreak occurred, we worked closely with
11 the Department of Health from day one to identify,
12 first, what was the culprit. And once it was
13 determined that NECC was the rogue actor here and
14 sent the contaminated product, that that's -- that's
15 what caused this. In other words, it wasn't
16 something at the facility; it was the product, the
17 steroid.

18 Once that was determined, the next
19 process was to determine who received it, which
20 was -- I can't remember the number, but it was
21 1,000, at least. Because, remember, they got 2500
22 doses, I think, or vials.

23 The next step was to, in conjunction
24 with the Department of Health, determine, "What do
25 we do? Do we call these people on the phone? Do we

1 e-mail them? Do we write them a letter? Do we go
2 track them down at their house?"

3 And some combination of that was done,
4 as has been documented in the media.

5 So this essentially asks for copies of
6 every letter. And we sent letters to all these
7 patients. Now -- so that -- that's overbroad. Now,
8 one -- it was the same letter. So one
9 representative letter to all these patients, I
10 think -- or one representative letter, I think, is
11 discoverable. But --

12 THE COURT: Hold on a second.

13 How does that sound, Mr. Nolan?

14 MR. NOLAN: If they represent it's the
15 same letter that went to everybody, I think that's
16 reasonable.

17 THE COURT: Okay. All right. Well,
18 that part is solved, then. Now, that doesn't --
19 that's not everything you're asking for.

20 MR. NOLAN: No, no. I mean, there's
21 surely been some internal communications as well as
22 communications with the Department of Health. And I
23 guess one thing I'm unclear about is: Are the
24 15,000 e-mails that have been quarantined, would
25 they include, for example, anything Dr. Lanford

1 sent, would they --

2 MR. TARDIO: We've quarantined his,
3 we've preserved -- everybody who worked at STOPNC,
4 we have their e-mails. It's just a matter of what
5 we do with them now.

6 THE COURT: Right.

7 MR. TARDIO: And how long it's going to
8 take.

9 THE COURT: Right.

10 MR. TARDIO: So yes -- I can't
11 represent -- I don't think I can represent that --
12 because I don't know. I can -- we have them. Is
13 everything in there? I don't know. You're talking
14 15,000 e-mails.

15 But it should capture anything that
16 those people from STOPNC sent or received with the
17 Department of Health or anywhere -- anybody else,
18 so --

19 MR. NOLAN: Okay.

20 MR. TARDIO: -- yes, to answer
21 Mr. Nolan's question.

22 THE COURT: Okay. And then we're back
23 to that issue we previously discussed about time,
24 how long it's going to take, cost. Time is money,
25 always. Time and cost are probably hand in glove.

1 And can it all be done between now and June 4, 5,
2 and 6? And if not, are the Plaintiffs willing to go
3 forward and take the chance that this is their only
4 shot at the interrogatory -- at the -- sorry --
5 depositions?

6 So, let's see. We really haven't
7 talked about the privilege issues, but I guess
8 they're really -- I know the answer is a good --
9 it's a good lawyer-like answer. It states every
10 privilege possible. But is the Tennessee Peer
11 Review Law of 1967 and the Tennessee Patient Safety
12 and Quality Improvement Act of 2011, is that
13 primarily the issue?

14 MR. TARDIO: Not with the e-mails, no,
15 sir. The primary privilege with the e-mails is
16 going to be going through -- the primary issue with
17 the e-mails is going to be going through however
18 many e-mails we get down to -- 1,000, 2,000, 5,000,
19 whatever it is -- redacting conversations with
20 lawyer --

21 THE COURT: Yes.

22 MR. TARDIO: -- where I sent an e-mail
23 and said, "I need this, this, and this," or, "You
24 need to do this, this, and this." So that's got to
25 be redacted. Any -- any conversation about another

1 patient --

2 THE COURT: Yes.

3 MR. TARDIO: -- you know --

4 THE COURT: Yeah, I understand.

5 MR. TARDIO: -- we're talking one
6 patient out of thousand. HIPAA, you've got to
7 redact that; any work product issue where they, for
8 us, are preparing something.

9 THE COURT: "They" meaning?

10 MR. TARDIO: Meaning the people
11 whose -- whose e-mails we had preserved, our
12 clients.

13 THE COURT: Okay.

14 MR. TARDIO: So that's -- that's the
15 issue with the privilege and e-mails. I'm certain
16 that there are e-mails that have attorney/client
17 communications and work product objections and HIPAA
18 objections within them.

19 THE COURT: Okay. Well, here -- this
20 is the real rub that we've -- we talked about the
21 last time we were all here. Ms. Hollabaugh brought
22 it up first. There are just so many e-mails to have
23 to go through. And, you know, it's -- it's going to
24 take a Herculean effort to get all that done, even
25 working nonstop between now and the scheduled

1 depositions of June 4, 5, and 6, 2013.

2 So what -- tell me what you suggest, if
3 anything, Mr. Nolan? You want to just say -- tell
4 the Defendants to do the best they can --

5 MR. NOLAN: I think we ought to --

6 THE COURT: -- and then see where we
7 go?

8 MR. NOLAN: I think we ought to do -- I
9 think we ought to, you know, have them first tell us
10 how many e-mails are included for those four players
11 that we've already discussed, you know. It may
12 be --

13 THE COURT: Say who they are again for
14 the record.

15 MR. NOLAN: They are Culclasure,
16 Schamberg, Butler, and Nurse Littleton.

17 And then tell us how many e-mails we're
18 talking about there. And that might make the whole
19 thing much easier. And if we think that it's still
20 unmanageable, then we'll talk about search terms.

21 THE COURT: Okay.

22 MR. NOLAN: And that might further
23 reduce things. That's my only suggestion.

24 THE COURT: All right. That -- that
25 sounds reasonable to me.

1 MR. TARDIO: It is reasonable. And I
2 will determine, as best we can, how many e-mails are
3 in those four -- four people's accounts. But if
4 there are 15,000 in this many, then I'd say in this
5 many, there are going to be at least 1,000, so I
6 don't know.

7 THE COURT: Just do the best you can.
8 That's all you can do.

9 MR. TARDIO: We will -- we will
10 certainly do the best we can.

11 THE COURT: All right. And then --
12 now, let's see. What -- now, have you -- just tell
13 me if I'm incorrect. Have you agreed, for purposes
14 of discovery, that copies of protocols, procedures,
15 memoranda, guidelines, is that -- you agree you-all
16 need to produce that or that's discoverable?

17 MR. TARDIO: All their policies and
18 procedures?

19 THE COURT: Well --

20 MR. TARDIO: Or are you talking related
21 to contact of patients?

22 THE COURT: Contact -- related to
23 contact of patients is what you wanted; isn't that
24 right, Mr. Nolan?

25 MR. NOLAN: That's what we asked in

1 this request, that's correct.

2 THE COURT: Yes.

3 MR. TARDIO: Yes, sir. And I'm
4 virtually certain there isn't one, but we will --
5 and we've turned over the -- the Table of Contents.
6 But I will double-check. And if Howell Allen has a
7 policy and procedure that dictates how patients are
8 contacted with an issue or medication issue, then I
9 will --

10 THE COURT: All right.

11 MR. TARDIO: I -- I agree that it's
12 discoverable.

13 THE COURT: All right. Very good.

14 Do you need to confer with Mr. --

15 MR. NOLAN: Not on that one, I don't
16 think.

17 THE COURT: Oh, I thought he might want
18 to talk to you about something. Okay.

19 All right. So -- and that's from
20 September 18th, 2012, forward; --

21 MR. NOLAN: That's right.

22 THE COURT: -- is that right?

23 Okay. So that -- that will be the
24 Court's order.

25 There's a lot of discussion there

1 within that order, but I think we all know what
2 we're talking about. We'll have to look at the
3 transcript to be sure we know. But . . .

4 All right. The next one is No. 27,
5 which is: Produce a copy of all of Howell Allen
6 Clinic's written policies, procedures, and
7 guidelines.

8 Objection of Howell Allen is that
9 the -- it's overbroad and unduly burdensome. The
10 contact -- contact and treatment issue took place at
11 STOPNC, not at Howell Allen.

12 Okay. What --

13 MR. NOLAN: I don't think we have the
14 index for Howell Allen's policies and procedures. I
15 don't think that's been produced, has it?

16 MR. TARDIO: I thought it had.

17 MR. NOLAN: Okay.

18 MR. TARDIO: I thought it had.

19 MR. NOLAN: I thought it hadn't.

20 And --

21 MR. TARDIO: Well --

22 MR. NOLAN: -- you know, if it has,
23 then we can look at it and identify some that we
24 would like to see. But I thought it had not been
25 produced. And we ought to at least have a chance to

1 see the index.

2 THE COURT: Well, I agree with that --

3 MR. TARDIO: Well, we will -- we
4 will -- if we have not already, we will produce the
5 index. I thought we had.

6 THE COURT: Okay.

7 MR. TARDIO: I -- I do have an
8 objection, though, to, again, just producing all of
9 Howell Allen's --

10 THE COURT: Well, I understand. But
11 I -- I'm going -- I'm going to be consistent. I
12 said earlier that I -- I think all -- you know,
13 discovery is broad. And whatever Mr. Nolan and
14 Mr. Leader say they want from the index that you --
15 that you-all -- well, start over.

16 Whatever y'all agree on, great. Y'all
17 agree, state what your agreement is. What you
18 cannot agree on -- I mean, policies and procedures,
19 I mean, I think they're all discoverable. So my
20 order is that if there's no agreement on certain
21 ones, unless there's something really stringently
22 objected to, if it's similar to the previous request
23 from STOPNC on policies and procedures, then I say
24 it's produced. You got to produce it. Plaintiffs
25 are entitled to it.

1 If there's some -- some very strong
2 objection, then present it to me, and I'll -- I'll
3 decide.

4 All right. The next request is No. 31:
5 Produce a copy of any e-mails, reports, memoranda,
6 policies, procedures, guidelines, or other material
7 that addresses the purchase, administration, and/or
8 use of MPA or other steroids at Howell Allen Clinic
9 and/or Saint Thomas Neurosurgical.

10 Howell Allen objects. The treatment
11 and contact at issue took place at STOPNC, not at
12 Howell Allen. Additionally, the request for
13 documents regarding activities at STOPNC should be
14 directed to STOPNC. For responsive documents, see
15 STOPNC's Responses to Plaintiffs' First Set of
16 Requests for Production.

17 First of all, Mr. Nolan, did that --
18 that information that was produced at -- by STOPNC's
19 Responses to Plaintiffs' First Set of Requests for
20 Production, did that help?

21 MR. NOLAN: They gave us information
22 about where STOPNC purchased its steroids. But
23 it's -- it's really the same issue that we discussed
24 earlier, that being --

25 THE COURT: Okay.

1 MR. NOLAN: -- you know, we wanted to
2 find out about Howell Allen's purchase of steroids.
3 And we really don't know -- you know, this could be
4 a very small universe of documents or a large
5 universe, depending on how much steroids they used
6 at Howell Allen and how many vendors they've used.

7 THE COURT: What do you say,
8 Mr. Tardio?

9 MR. TARDIO: They inject other joints.

10 THE COURT: All the time?

11 MR. TARDIO: I don't know. I don't
12 know the answer to the question about frequency.
13 But I know they have purchased MPA and other
14 steroids for use in shoulder, knee. Not the -- the
15 cervical or lumbar. But -- so yeah, there are
16 responsive documents.

17 My objection is that they're not
18 relevant. I mean, there are -- they're, in essence,
19 a parent company, a member of -- a member of STOPNC
20 under the statute we looked at. And their purchases
21 of medications and their treatment of patients are
22 irrelevant and not reasonably calculated to lead to
23 the discovery of admissible evidence. So I
24 respectfully submit to the Court that the objection
25 stands on its own.

1 THE COURT: All right.

2 MR. NOLAN: Your Honor, I would say --
3 you know, for example, if there was a memorandum
4 issued by Dr. Lanford and Howell Allen to all the
5 other Howell Allen doctors that says, "This is how
6 we should evaluate compounding pharmacies," or, "We
7 should only use Depo-Medrol when we're injecting
8 joints because that's made by Pfizer and that's a
9 good product."

10 You know, if -- I don't know what
11 exists; but if -- if stuff like that is there, it
12 would certainly be encompassed within this request.
13 And it would be relevant.

14 MR. TARDIO: I don't disagree. But
15 that's not what the interrogatory -- the request
16 asks for. It doesn't say, "Is there a memoranda --
17 or memorandum within Howell Allen that directs
18 people to how to buy from compounding pharmacies?"
19 That's something specific that we can ask our
20 client. And they can say, "Yeah, we have it," or,
21 "No, we don't." But when you ask for all memoranda
22 related to drug purchases with no time limit, --

23 THE COURT: Yeah.

24 MR. TARDIO: -- that -- frankly, it's
25 almost impossible to answer without just saying,

1 "Give me every document you've ever created related
2 to drug purchases."

3 THE COURT: All right. Want to do a
4 time frame like we did the last --

5 MR. NOLAN: Yeah. I would say five
6 years and limited to steroids.

7 THE COURT: Steroids, five years from
8 10-1-2012, like we did before? Is that
9 acceptable --

10 MR. NOLAN: (Nods head.)

11 THE COURT: -- as a narrowing?

12 MR. NOLAN: (Nods head.)

13 THE COURT: Is that a "yes"?

14 Or if it's not acceptable, just say
15 it's not. But that will be the order.

16 MR. NOLAN: That's -- that's -- that's
17 fine with us.

18 THE COURT: Okay. All right. So
19 steroids, five years -- five years back from
20 10-1-2012. And my ruling on that previous one, I
21 think this is really the same, and tell me if I'm
22 incorrect. It's Interrogatory No. 2 that was
23 objected to by the defense of Howell Allen Clinic
24 responses.

25 So my -- my ruling will be the same. I

1 believe it's a very, very similar question, so same
2 ruling. And same time frame: five -- five years
3 back from 10-1-2012, and steroids.

4 All right. Next one, Request to
5 Produce 32: Produce a copy of any policies,
6 procedures, guidelines, or other printed material
7 that addresses epidural steroid injections performed
8 at the Howell Allen Clinic and/or Saint Thomas
9 Neurosurgical.

10 Howell Allen's response is: Objection.
11 Objects to a portion of the request regarding
12 activities performed by STOPNC. That request should
13 be directed to STOPNC.

14 And I'm assuming, Mr. Nolan, you did
15 make that request to STOPNC?

16 MR. NOLAN: We did.

17 THE COURT: And you got information,
18 but you still want the same information from Howell
19 Allen?

20 MR. NOLAN: Yeah.

21 THE COURT: All right. And then the
22 further objections: Epidural steroid injections are
23 not performed at the Howell Allen Clinic.

24 Okay. Mr. Tardio?

25 MR. TARDIO: That's the objection. I

1 don't know what relevance the -- the members --
2 again, it's not -- we'll tell you what -- what they
3 do, where this treatment took place, but it's
4 irrelevant and not reasonably calculated to lead to
5 the discovery of admissible evidence when asking
6 these same questions about a member where the
7 treatment didn't take place.

8 THE COURT: All right. Well, I -- this
9 is a similar issue we've had before I've already
10 ruled. And I'm going to rule that it's discoverable
11 and should be provided by Howell Allen. Objection
12 overruled.

13 All right. No. 33: Produce a copy of
14 all internal communications of Howell Allen Clinic
15 related to NECC's recall of MPA and/or the recent
16 fungal meningitis outbreak.

17 Howell Allen's response is: Objection.
18 Seeks information protected by work product,
19 Tennessee Peer Review, Tennessee Patient Safety and
20 Quality Improvement Act, overbroad, unduly
21 burdensome. Essentially asks for every internal
22 communication related to the fungal meningitis
23 outbreak.

24 And -- and I agree with that last
25 statement. So tell me what you think. Any way we

1 can narrow that, Mr. Nolan?

2 MR. NOLAN: You know, it's already
3 limited in time because it wouldn't go back any
4 earlier than September the 18th, which was the
5 first --

6 THE COURT: All right.

7 MR. NOLAN: -- indication of a problem.
8 That's September the 18th of 2012.

9 THE COURT: 2012? So anything after
10 that. So that -- that is limited. We -- there was
11 a limitation put on a similar request earlier, so
12 that -- that helps, to a degree.

13 MR. TARDIO: I need to be heard on this
14 because --

15 THE COURT: Sure.

16 MR. TARDIO: -- we're talking -- now
17 we've broadened the universe of e-mails beyond the
18 15,000. The 15,000 e-mails only is the Howell Allen
19 employees who worked at STOPNC. Howell Allen
20 certainly has more employees than that. They have
21 facilities in Kentucky, here, and other communities.
22 So it's going to be much more than 15,000 e-mails
23 we're going to have to preserve, and --

24 THE COURT: "All internal
25 communications" is very broad.

1 MR. TARDIO: So that would conceivably
2 grab, if the office manager in the Hopkinsville
3 office of Howell Allen sent an e-mail to her son
4 saying, "This fungal meningitis outbreak is awful."
5 So we have to go through all 5,000 of her -- that
6 office manager's e-mails and -- or 1,000 or 500 or
7 however many, looking for anything that -- it's just
8 too broad and too cumbersome and too burdensome
9 as -- as drafted, even with the limitation -- the
10 time limitation.

11 THE COURT: All right. Can you
12 suggest, Mr. Nolan, further narrowing? I mean, do
13 you want to redraft that? You want to redraft it
14 right now so I can rule on it?

15 MR. NOLAN: What if we -- what if we --
16 what if we limited it to internal communications
17 involving STOPNC's -- the people who worked at
18 STOPNC, or people who worked at Howell Allen's main
19 office?

20 MR. TARDIO: I don't -- we didn't
21 preserve every Howell Allen employee. We preserved
22 employees at Howell Allen who worked at STOPNC. And
23 I thought that was reasonable and a good faith
24 response to expected litigation. So I don't know if
25 we have every Howell Allen's -- every Howell Allen

1 employee's exhaustive e-mail account. I don't know
2 if we have it. I know we have the people who worked
3 at STOPNC who -- I think it's reasonable those are
4 the people who would be involved in this.

5 So it's going to have to be limited to
6 those people, or else I can't guarantee we've got
7 everything that Howell Allen sent or received.

8 MR. NOLAN: Your Honor, I might make a
9 suggestion. I wonder if we shouldn't defer this
10 particular request for -- for the present and -- you
11 know, for example, when we take these depositions,
12 we may find out that there's someone else that we're
13 going to need to depose in the course of the
14 lawsuit. Like maybe Dr. Lanford was heavily
15 involved in this, and we're going to have to depose
16 him. So we may need to approach Mr. Tardio and say,
17 "Okay. Now we need to make sure we've got Mr. --
18 Dr. Lanford's e-mails."

19 I think maybe kind of a smaller-bite
20 approach might help. So I'd be willing to yield on
21 this request for present and -- and --

22 THE COURT: Just wait and see what the
23 depositions reveal?

24 MR. NOLAN: Right.

25 THE COURT: All right. That's good.

1 So -- so withdrawn at this time? Would
2 that be the --

3 MR. NOLAN: Sure.

4 THE COURT: -- answer?

5 Okay. That's No. 33.

6 All right. And the next one is No. 34:
7 Produce a copy of all external communications
8 between Howell Allen Clinic and any other person or
9 entity relating to NECC's recall of MPA and/or the
10 recent fungal meningitis outbreak.

11 Objection by Howell Allen?

12 MR. TARDIO: It's the -- it's the same
13 issues, Judge. The next several are the same.

14 THE COURT: All external communication.

15 MR. NOLAN: You know, I would suggest
16 the same approach. I -- I think we ought to yield
17 this for now --

18 THE COURT: All right.

19 MR. NOLAN: -- with the understanding
20 that we may, after these depositions, be asking for
21 some additional documents.

22 THE COURT: So No. 34 is withdrawn at
23 this time.

24 Okay. No. 35: Produce all
25 communications between Howell Allen Clinic and the

1 Tennessee Department of Health, the FDA, the CDC
2 and/or any other governmental entity relating to
3 NECC's recall of MPA and/or the recent fungal
4 meningitis outbreak.

5 Howell Allen objects. Because our
6 reports of investigations by public health agencies
7 such as Tennessee Department of Health and the CDC
8 regarding fungal meningitis outbreak are protected
9 from disclosure due to Tennessee Peer Review of
10 1967, Tennessee Patient Safety and Quality
11 Improvement Act of 2011, work product,
12 attorney/client, HIPAA. And those not protected are
13 freely available to the Plaintiff from various
14 governmental entities.

15 In other words, Plaintiff can get --
16 get information just as easy as you can provide it
17 to him; is that correct?

18 MR. TARDIO: Some of it. But, I mean,
19 this is going to require us -- these are -- I'd
20 submit, respectfully, that 33 through 37 are going
21 to kind of raise the same issues: How do we go
22 through all of Howell Allen's e-mails and locate
23 communications with governmental entities regarding
24 the outbreak?

25 THE COURT: What do you say, Mr. Nolan?

1 MR. NOLAN: I don't think that would be
2 that hard. I mean, I think what would -- what would
3 have to happen is, the lawyers would first have to
4 approach Howell Allen and say, "Okay. Who was
5 communicating with the government about this? Who
6 was communicating with the government?" And then
7 find that person and ask what they have.

8 I think that's all that's required.

9 THE COURT: And "the government"
10 meaning the Tennessee Department of Health, C- --
11 any governmental entity?

12 MR. NOLAN: That's right.

13 MR. TARDIO: Okay. I think that that
14 information, who was -- who was communicating with
15 the government, is discoverable, and I think that
16 we've either given it or it will come out in the
17 depositions.

18 I -- I gather that Mr. Nolan's asking
19 me to then ask them to go through all their e-mails
20 and see if they have any communications with the
21 government?

22 THE COURT: Is that right, Mr. Nolan?

23 MR. NOLAN: Yes.

24 THE COURT: Another big task?

25 MR. TARDIO: Well, I don't know how

1 they're going to do it. Do you just look at every
2 single e-mail you sent for the last eight months,
3 seven months, or do you search?

4 THE COURT: Well, is there any way to
5 do it by . . .

6 MR. TARDIO: I guess you could do
7 keywords.

8 THE COURT: Yeah, right. Like
9 "Tennessee Department of Health," "CDC," or other
10 public health agencies. I don't know what others
11 there would be, but . . .

12 MR. NOLAN: I mean -- yeah.

13 THE COURT: I say do the best you can
14 on that, and -- and maybe try to use keywords and --

15 MR. TARDIO: And --

16 THE COURT: -- get as much information
17 as you can. And then if you've got -- they've got
18 some things that are --

19 Well, tell me how any of that might be
20 privileged. It might be protected.

21 MR. TARDIO: Well, it could be HIPAA --
22 HIPAA-related, --

23 THE COURT: That's right. Sure.

24 MR. TARDIO: -- if you're talking about
25 another patient.

1 THE COURT: Sure. Oh, absolutely. But
2 I'm talking about with regard to these Plaintiffs.

3 MR. TARDIO: Oh, these Plaintiffs?

4 THE COURT: Yes.

5 MR. TARDIO: We've produced all e-mails
6 that mentioned Diana Reed, of the players, the
7 people involved in this.

8 THE COURT: Okay.

9 MR. TARDIO: We did the key- --
10 keyword -- I think we did it by keyword search.
11 Right?

12 MR. ZINI: We went through
13 Schamberg's --

14 MR. TARDIO: We went through Debra
15 Schamberg's --

16 MR. ZINI: -- and did keyword
17 through --

18 MR. TARDIO: -- and keyword searched
19 the other accounts. So --

20 THE COURT: For -- for governmental
21 agency communications?

22 MR. TARDIO: No. For Diana Reed.
23 There are going to be a lot more governmental.

24 THE COURT: Well, that's all we're
25 talking about right now, is governmental.

1 MR. TARDIO: Right. What I -- I guess
2 what I'm saying is, there are going to be a lot
3 more, --

4 THE COURT: I see what you're saying.

5 MR. TARDIO: -- and it's going to
6 broaden the scope, and you're going to be picking up
7 a thousand patients.

8 THE COURT: A lot of different
9 patients, yes.

10 MR. TARDIO: So --

11 MR. NOLAN: I mean, I'm sure that
12 Howell Allen had a point person or two to
13 communicate with the government. It just didn't let
14 all of its employees start sending stuff to the FDA.
15 So I don't see what would be more complicated than
16 just have these good lawyers find out, who were the
17 point people in communicating with the government,
18 and then someone needs to go through their stuff.

19 And you'd start by asking these people,
20 "All right. Gather up all your communications that
21 you had with the CDC or the FDA or the Tennessee
22 Department of Health."

23 THE COURT: And that's assuming they
24 had some key people doing that. That's a fairly --
25 fairly valid assumption, I would think.

1 MR. TARDIO: Sure, that's true.

2 I -- I think we can identify the people
3 without any problem. I just don't know how many
4 e-mails we're talking about. And what I'm afraid of
5 is, if we're asked to produce everything, every
6 communication with any governmental entity,
7 that's -- that's a pretty tall burden.

8 THE COURT: It is.

9 MR. TARDIO: And then if a few of them,
10 for whatever reason, aren't caught by the keyword
11 search, or when I ask the lady at Howell Allen,
12 who's -- who may have e-mailed with the government
13 eight times, and she doesn't do a very thorough
14 search, and she says, "I don't have any," well, do I
15 then have a duty to go search every one of her
16 e-mails to check?

17 I'm trying to fulfill my duty to
18 produce discoverable information at -- in an
19 efficient way, but I'm also trying to protect my
20 client from being blamed in eight months for not
21 turning up e-mail 15,001.

22 So if Your Honor orders me to follow a
23 certain process, of course I will do it. And if
24 that process is identify who these people were
25 communicating with the government, and then do

1 keyword searches and pull out e-mails that come back
2 with CDC or Department of Health, I'm certainly
3 willing to do that. I think that's a reasonable way
4 to do it. But as drafted, that asks for a lot more.

5 THE COURT: I agree. And I think that
6 the narrower approach you've suggested is a good way
7 to handle this. And -- and then you do the best you
8 can with your key people. I mean, they -- you can't
9 vouch for their memory or lack of memory. I mean,
10 you do the best you can with that. And then, you
11 know, as -- as time moves along, as we all know,
12 people's memories are jogged by whatever events or
13 conversations occurred. They say, "Oh, I do
14 remember." Just supplement. I mean, that's the
15 best you can do. We're dealing with human beings
16 who, you know, may or may not remember everything.
17 Just do the best you can.

18 All right. With that explanation and
19 narrowing of the requests, the objection is
20 overruled to No. 35.

21 Now, we're at No. 36: Produce all
22 communications between Howell Allen Clinic and
23 anyone associated with Saint Thomas Hospital,
24 Saint Thomas Network, and/or Saint Thomas Health
25 relating to NECC, NECC's recall of MPA, and/or the

1 recent fungal meningitis outbreak.

2 Howell Allen's objection is that --
3 let's see -- it seeks information protected by work
4 product, Tennessee Peer Review Law, Tennessee
5 Patient Safety and Quality Improvement Act, and that
6 it's overbroad and unduly burdensome, and is not
7 focused on this patient.

8 So let's see if we can narrow it.

9 MR. NOLAN: I'd suggest that we defer
10 that one until after the deposition.

11 THE COURT: Defer? Okay. So -- so
12 withdrawn at this time, like -- as we did the
13 others?

14 MR. NOLAN: Sure.

15 THE COURT: All right.

16 Okay. No. 37: Produce all
17 communications between Howell Allen Clinic and
18 anyone associated with Saint Thomas Neurosurgical
19 relating to NECC, NECC's recall of MPA, and/or the
20 recent fungal meningitis outbreak.

21 Howell Allen objects. Let's see.
22 Seeks information protected by work product,
23 Tennessee Peer Review, Tennessee Patient Safety and
24 Quality Improvement Act, overbroad and unduly
25 burdensome, and is not focused to this patient.

1 MR. NOLAN: Your Honor, I would suggest
2 that -- that we follow the process for the four key
3 players that we've already outlined. I think that
4 same process should be applied to this -- this
5 question, because that would make sense.

6 THE COURT: And the four people again
7 are, for the record?

8 MR. NOLAN: They are Debra Schamberg,
9 Dr. Culclasure, Scott Butler, and Nurse Littleton.

10 THE COURT: Okay. With that suggested
11 narrowing, what do you say, Mr. Tardio?

12 MR. TARDIO: For the record, I maintain
13 the objection we stated, --

14 THE COURT: Yes.

15 MR. TARDIO: -- but I understand the
16 order of the Court.

17 THE COURT: Okay. To be consistent, I
18 stand by my previous order on that, on this type of
19 issue. And the requests are limited to Nurse
20 Schamberg, Dr. Culclasure, Mr. Butler, and Nurse
21 Littleton.

22 All right. And I believe this is the
23 last. No. 69: Produce all photographs taken in
24 connection with NECC recall and/or the fungal
25 meningitis outbreak, including, but not limited to,

1 photographs of any NECC products or Saint Thomas
2 Neurosurgical's facilities.

3 Howell Allen objects on the basis of
4 privilege, work product, attorney/client privilege.
5 Photos were taken at instruction of counsel,
6 privilege discovery.

7 Is that not the same issue we've
8 already discussed and I already ruled --

9 MR. NOLAN: Yes, we've already
10 discussed that.

11 THE COURT: -- I've already ruled on?

12 MR. NOLAN: Yes.

13 THE COURT: Okay. And I ruled, I
14 believe, that it's not work product and not
15 privileged. But if it is, the two -- the -- if it
16 is work product, that Plaintiff has a substantial
17 need for the materials and is unable to obtain the
18 materials or their substantial equivalents by other
19 means without undue hardship, or maybe
20 impossibility, particularly if the scene has changed
21 from the time the photographs were taken by the
22 Defense till now. And that would make it impossible
23 to replicate the images taken by photographs that
24 were taken much earlier by the Defense.

25 Is that all of the discovery issues?

1 MR. NOLAN: I realized that we skipped
2 one, Your Honor.

3 THE COURT: Oh, okay. Sorry.

4 MR. NOLAN: And that is STOPNC's
5 responses to Request for Production 56, which is the
6 request that asks for STOPNC's board minutes.

7 THE COURT: Yes. Sorry.

8 MR. NOLAN: And they produced redacted
9 board minutes to us, which are useless. I mean, we
10 think we ought to at least be able to review
11 STOPNC's board minutes, given the circumstances and
12 the fact that we have corporate veil piercing claims
13 and, you know, probing whether corporate formalities
14 are observed is important, and many other different
15 issues.

16 The approach we suggested is we should
17 have the opportunity to at least see those at
18 Mr. Tardio's office, and if we think there's
19 something in there that's relevant, we'll address it
20 with them directly. And if we can't agree to it,
21 then we could give it to the Court for in camera
22 inspection.

23 THE COURT: Okay. And the objection --

24 MR. TARDIO: The objection is not to
25 production of any of the board minutes.

1 THE COURT: Right.

2 MR. TARDIO: The objection is to parts
3 of the board minutes that are attorney/client
4 communications, --

5 THE COURT: Right.

6 MR. TARDIO: -- peer review actions,
7 and things that have nothing to do with this
8 lawsuit. So I don't think filing a lawsuit entitles
9 you to every corporate document produced within that
10 business. And I don't think anybody here thinks
11 that it does, but that's what is being asked for.

12 I also don't think it entitles a party
13 to then inspect and choose what they want and what
14 they don't want. That defeats the purpose of
15 objecting to any part of it.

16 So we produced what, as officers of the
17 court, we submitted was not privileged and
18 discoverable. We redacted what we didn't feel was
19 discoverable, and we redacted anything that was
20 privileged. So I -- and we went back two years
21 instead of going back -- I don't know if there was
22 even a time limitation on the --

23 If the question is whether these
24 meetings existed for purposes of the corporate veil
25 claim, they did. And they can ask any of these

1 witnesses whether these meetings existed and, "What
2 did you discuss?" And that's fine, as long as it's
3 not asking for privileged information.

4 But unlimited access to board minutes,
5 I think, is -- I don't think is -- is contemplated
6 or allowed by the Rules.

7 THE COURT: Okay. Mr. Nolan?

8 MR. NOLAN: Here's what I would
9 respectfully suggest. First of all, we didn't limit
10 this in time, and I think a temporal limitation is
11 reasonable. I would suggest the five-year
12 limitation. And I think we're entitled to see all
13 corporate records going back five years, given that
14 we have a corporate veil piercing claim.

15 Now, if there's attorney/client
16 privilege included in the board minutes, we're not
17 entitled to see that, and that would be legitimately
18 redacted. But if they're going to redact that, they
19 should give us a privilege log that says --

20 THE COURT: Why.

21 MR. NOLAN: -- why they're redacted.

22 THE COURT: Yes. I agree with you.

23 MR. NOLAN: And, you know, as far as
24 the Quality Improvement Committee privilege is
25 concerned, I mean, the Court's taken that under

1 advisement for present. But I think that they
2 should give us all the corporate records. And if
3 they redact something based on privilege, they ought
4 to tell us specifically what they're withholding and
5 why they're withholding it.

6 But, you know, the annual reports and
7 the bylaws and the charter and that stuff, we should
8 receive that information.

9 THE COURT: Well, you get -- can't you
10 get the charter at the Secretary of State?

11 MR. NOLAN: I think we could get that
12 from the Secretary of State, yeah.

13 THE COURT: Bylaws, aren't they -- is
14 that part of what's filed with the Secretary of
15 State? I'm not sure. Maybe not.

16 MR. TARDIO: I don't know.

17 MR. NOLAN: I'm not sure of that
18 either.

19 THE COURT: I don't either.

20 MR. NOLAN: I mean, I assume on a shelf
21 somewhere there's a corporate minute book, record
22 book, that contains all of these corporate
23 documents, and I think they ought to at least show
24 that to us --

25 THE COURT: All right.

1 MR. NOLAN: -- absent any
2 attorney/client privilege stuff.

3 THE COURT: Well, I think what
4 Mr. Tardio is saying is -- and I agree with
5 Mr. Nolan. I mean, redact what you think needs to
6 be redacted. A five-year limitation, I don't think
7 is too excessive. And five-year limitation -- well,
8 month, year. What year?

9 MR. NOLAN: From October 1st of 2012,
10 backwards.

11 THE COURT: 10-1-2012 back five years?

12 MR. NOLAN: Yeah.

13 THE COURT: Okay.

14 And, Mr. Tardio, redact whatever you
15 think is privileged and give a privilege log on all
16 redactions, and then we'll see where we go from
17 there. I think that's the best you can do. I think
18 that's the best we can do on that right now.

19 MR. TARDIO: Right.

20 What about the portions of the board
21 minutes that have zero to do with this lawsuit,
22 zero?

23 THE COURT: Well --

24 MR. TARDIO: "We're going to -- we're
25 going to institute eight fire drills this year

1 instead of six." "We are going to lease our parking
2 spaces instead of buying them."

3 THE COURT: Well, what do you propose?
4 You propose to redact?

5 MR. TARDIO: Well, that's what we did.

6 THE COURT: Oh, okay. You've already
7 done that?

8 MR. TARDIO: Uh-huh.

9 THE COURT: Well, I think you ought to
10 say --

11 MR. TARDIO: What's in there?

12 THE COURT: Well, I was getting ready
13 to say why you redacted it, but --

14 MR. TARDIO: I mean, the problem is --

15 THE COURT: -- it has to do with
16 parking space, I mean, you could -- you could -- on
17 a privilege log, you -- it's really not a privilege
18 log. It's not privileged. But, I mean, it's -- if
19 it's something that inane -- and I'm sure a lot of
20 it is -- I mean, there's really no harm, is there?

21 MR. TARDIO: No. But some of it isn't.
22 I mean, it's still an invasion --

23 THE COURT: I understand.

24 MR. TARDIO: -- into these people's
25 business --

1 THE COURT: I understand.

2 MR. TARDIO: -- that doesn't have
3 anything to do with this lawsuit. And I understand
4 that there are things in there that do have to do
5 with this lawsuit.

6 THE COURT: Well --

7 MR. TARDIO: And I'm not saying those
8 aren't discoverable.

9 THE COURT: Well, if it's not
10 privileged, it's discoverable. They can see it. If
11 it's clearly things like parking spaces and other
12 things like that, I mean, clearly not relevant, but
13 it's there. And I understand it's an invasion, but,
14 you know, we got a lawsuit here, and discovery is
15 very broad in Tennessee. If you don't have
16 privilege, or it's not, you know, so overly broad to
17 be too time-consuming and expensive to produce, then
18 I think you ought to produce it.

19 So -- I understand the -- your
20 argument. You're making a good argument for your
21 client. Both of y'all are. Both sides are
22 representing their clients as they should,
23 zealously, and that's exactly what you're charged
24 with doing. You're doing it and doing a great job.
25 That's why I'm here just to referee the disputes.

1 So that's -- that's what we've done today.

2 And so I think Mr. Nolan's narrowing of
3 the Request sixty- -- I'm sorry -- 56 for STOPNC is
4 accepted by the Court. And to that extent, the --
5 with that narrowing, the objection is overruled.
6 No. 56.

7 All right. Now we've got some requests
8 to limit the discovery to seven hours per witness;
9 is that right?

10 MR. TARDIO: Yes, sir. I filed that.
11 I frank- -- admittedly, Mr. Nolan has not had a
12 chance to respond. So with that caveat -- it's a
13 simple motion. If Your Honor wants to take it up
14 and Mr. Nolan doesn't mind, I'm fine arguing it.

15 MR. NOLAN: I think we ought to go
16 ahead and talk about it, Your Honor, --

17 THE COURT: Okay.

18 MR. NOLAN: -- if the Court is inclined
19 to do that.

20 THE COURT: Sure.

21 MR. NOLAN: Your Honor, I don't
22 understand their -- why they're requesting this
23 limitation. It's not contained in the Rules of
24 Civil Procedure, you know, particularly given the
25 enormous scope of the tragedy that occurred here. I

1 mean, 15 people dead, more than 100 who contracted
2 meningitis. I just don't understand why
3 Saint Thomas Neurosurgical would take the position
4 that under these circumstances, given that these
5 folks made the decision to buy this stuff from this
6 out-of-state compounder, they're entitled to special
7 treatment that's not provided for in the Rules.

8 So that's -- that's our first position.

9 And I don't know how the Court would --
10 would impose restrictions on parties who are not
11 before it, you know, people who aren't parties to
12 the lawsuit. And I kind of felt like the motion was
13 designed to achieve that.

14 But, you know, we think we need to be
15 able to take very thorough depositions of these
16 people.

17 THE COURT: Well, I had modified --
18 you-all had competing orders at our last meeting.
19 Have y'all -- y'all got a copy of the modified order
20 I sent you?

21 MR. TARDIO: Yes, sir.

22 THE COURT: Okay. And I think that
23 sets out well what the nonparties are to do that
24 will give you-all, the questioning attorneys,
25 questions and let you ask them. If you don't want

1 to ask those questions -- I mean, you might not want
2 to do that -- then I'm going to -- I'm going to
3 require those lawyers to identify themselves,
4 identify their potential client, and ask the
5 question.

6 But these nonparties and attorneys who
7 will be participating, I don't want them to take
8 over your deposition, the Plaintiffs' deposition or
9 the Defendants' deponents, and make this burdensome
10 for everybody.

11 So -- well, can I have the calendar,
12 William, please?

13 I feel like I'll be around and y'all
14 can contact me, is what I'm thinking, --

15 COURT OFFICER: (Tendering calendar.)

16 THE COURT: Thank you.

17 -- if you have a problem.

18 MR. TARDIO: You might regret that.

19 THE COURT: Well, I don't know. Y'all
20 don't know. Or you do know. Surely, you know my
21 reputation, that I stay here long hours, and there
22 are not many days I miss.

23 I will be here 4, 5, and 6 -- or
24 actually, let's see. A pretrial conference on the
25 3rd of June for a case set for trial on 6-17.

1 Motions in limine, basically. And then I've got a
2 Motion for Summary Judgment in a securities fraud
3 case on the 5th at 1:00 p.m. I've got a review for
4 that. And nothing right now in court for the 6th.
5 But I've got -- I'll have a monster motion docket on
6 the 7th because I'm missing a couple of motion
7 dockets because of being out of town.

8 So I'll be around. And I'll give y'all
9 my cell phone if I'm not here at the office or if
10 it's after hours. And I might -- sometimes I'm here
11 a lot after hours reviewing, preparing for the next
12 day or next days, and sometimes I don't hear that --
13 hear the telephone in the office. I'll give you my
14 cell number to call me if you need me. And
15 that's -- everybody else has got it, so -- 289-3792.
16 And I'll try to help you-all if you run into some
17 problems.

18 I don't -- I just don't think putting
19 an artificial limit -- I mean, you may complete one
20 well before seven hours. You may not. You may need
21 to go on. And I -- y'all are all really very good
22 at what you do. You're all excellent lawyers, and
23 you're not going to be -- I mean, these discovery
24 depositions, sometimes they take longer than you
25 anticipate because -- because one question and then

1 answer leads to others that you did not -- other
2 questions you did not anticipate. I mean, you're
3 going to anticipate very many questions, but
4 depending on what the answers are, you may end up
5 with a lot more questions.

6 So just, it's hard to know how long a
7 deposition is going to take, so I'm not going to put
8 an artificial limit on it. But just use good --
9 good reason and common sense. I know that you-all
10 will do.

11 Now, the next is to limit all present
12 law firms to one questioning attorney. What about
13 that? I mean, that doesn't seem too unreasonable.

14 MR. NOLAN: I agree, Your Honor, per
15 witness. I mean, you know, for example, I might
16 want to take the lead on one witness, and Mr. Leader
17 might --

18 THE COURT: Yes.

19 MR. NOLAN: -- want to take the lead on
20 another witness.

21 THE COURT: That's all right with you,
22 Mr. Tardio?

23 MR. TARDIO: Yes, that's fine. What
24 I'm trying to prevent is Mr. Nolan doing five hours
25 of questioning and then Mr. Leader saying, "I've got

1 five hours" on the same witness; Mr. Kinnard saying,
2 "I've got five hours"; Mr. Clayton saying, "I've got
3 five hours."

4 I think that it's fair --

5 THE COURT: Yes.

6 MR. TARDIO: -- to expect one lawyer
7 from each firm.

8 THE COURT: Yes, I -- I agree.

9 So that will be the Court's order.

10 All right. Now, on the privilege
11 issue, what's the -- what's the word on getting an
12 updated -- well, not updated, but a supplemental
13 affidavit? And then depending on what it says, you
14 know, we still may have -- well --

15 MR. TARDIO: I can --

16 THE COURT: -- I know we're going to
17 have issues, no matter what it says, I believe.

18 MR. TARDIO: I can represent to the
19 Court it's being signed, and it will say that this
20 is the first draft. I'm not sure what happened --
21 what the final draft looks like. But it will say
22 that the 2012 contract, Debra Schamberg entered into
23 it. It was with the same pharmacist that tracked
24 back to 2007. The relationship and the duties and
25 the functions hasn't changed since 2007. The

1 contracts are with Saint Thomas Outpatient
2 Neurosurgical Center.

3 Regardless of the name in there, we --
4 the -- the names do not -- aren't our names.
5 That -- Saint Thomas Outpatient Neurosurgical
6 Center, the entity, was the contracting party.

7 THE COURT: Even if --

8 MR. TARDIO: Even if it says
9 Saint Thomas Surgical Center, or whatever it says on
10 the contract.

11 THE COURT: All right. What -- go
12 ahead.

13 MR. TARDIO: That Tina Sullivan was the
14 pre- -- was the facility director beforehand. And
15 then from 2007 to present, the pharmacist consultant
16 has fulfilled the same duties as set out in both the
17 contracts and the affidavit.

18 THE COURT: What about the reference to
19 the -- in the pharmacy consulting contract that is
20 entered -- it was handed to me today, the one that
21 says it was entered into February 1, 2007, that
22 talks about that the contract was entered into for
23 the purpose of providing an available pharmacy
24 license for the Oral Surgery Institute.

25 Is that -- what is that? Is that a

1 mistake?

2 MR. TARDIO: It's a cut-and-paste job.
3 I mean, it doesn't affect the terms of the contract.
4 The duties -- the affidavits now, two of them -- or
5 there will be two of them in the record -- say what
6 the duties between Saint Thomas Outpatient
7 Neurosurgical Center and the pharmacist consultant
8 were and what they were doing.

9 THE COURT: Okay.

10 MR. TARDIO: I mean, I don't --

11 THE COURT: Well, I guess those will be
12 questions that will asked of Debra Schamberg --

13 MR. TARDIO: Sure.

14 THE COURT: -- at her deposition.

15 MR. TARDIO: That's the other thing.
16 We're kind of doing this in the abstract, so it's
17 somewhat difficult to draft these affidavits on --
18 with a time budget and get everything in there you
19 want to get in there.

20 But now I think the record is clear
21 that from '07 to 2012, there was a pharmacist
22 consultant who contracted with this entity to
23 fulfill functions and purposes and duties that are
24 contemplated by the statute.

25 So I think we've answered that

1 question.

2 THE COURT: All right. And you'll be
3 able to get that to the Plaintiffs' attorneys today,
4 you think?

5 MR. TARDIO: Yes, sir, or first thing
6 in the morning.

7 THE COURT: First thing in the morning?
8 Okay.

9 MR. TARDIO: Yes, sir. I mean, I -- I
10 don't know if it's going to be back and be able to
11 file it before 4:30. But, you know, I'll file it in
12 the morning.

13 THE COURT: Okay. All right. I've got
14 an expedited motion hearing in the morning at 9:00
15 in a case that's set for trial in August, jury
16 trial. I've got to be at -- before the Metro
17 Council at 4:00 p.m. for a budget hearing.

18 Y'all want to come back at 1:00 and see
19 if we can --

20 MR. TARDIO: Tomorrow?

21 THE COURT: Tomorrow.

22 MR. TARDIO: I'm scheduled to be out of
23 town at a meeting.

24 THE COURT: All right.

25 MR. TARDIO: Is Your Honor going to

1 want supplemental briefing on the issue?

2 THE COURT: No, I don't think that's
3 necessary. I don't believe.

4 MR. NOLAN: I think we ought to just
5 come over and talk about it.

6 THE COURT: Come over and argue --
7 finish arguing based on the -- based on the
8 supplemental affidavit --

9 MR. NOLAN: Okay.

10 THE COURT: -- and go on and get it
11 done.

12 MR. NOLAN: I agree.

13 THE COURT: And -- if y'all can do it.
14 And I'm sorry -- can somebody else come? I mean, I
15 know you've been the lead on this.

16 MR. TARDIO: Just tell me again what
17 the -- we're talking tomorrow afternoon? Is that
18 the slot we've identified?

19 THE COURT: Yes. And that's all I've
20 got.

21 MR. TARDIO: Okay.

22 THE COURT: And I've told y'all, I've
23 got a preplanned vacation that -- you know, almost
24 nine or ten months ago, --

25 MR. TARDIO: Understood.

1 THE COURT: -- paid for. And I'm
2 going.

3 MR. TARDIO: I understand that
4 completely.

5 THE COURT: And so I'm trying to get
6 y'all in before I leave so you can get these
7 depositions going.

8 MR. TARDIO: And the earliest is 1:00
9 tomorrow?

10 THE COURT: Yes. Well, based on who
11 I've got at 9:00, I think 1:00 is probably right.

12 MR. NOLAN: May I ask --

13 THE COURT: Yes.

14 And I've got to be at that budget
15 hearing, but it's just downstairs in Council
16 chambers at 4:00.

17 MR. NOLAN: At 4:00?

18 THE COURT: Yes.

19 MR. NOLAN: Would it be possible to do
20 2:00 rather than 1:00 tomorrow? I can move
21 something I've already got at 1:00.

22 THE COURT: And Mr. Tardio, you're out
23 of town, aren't you?

24 MR. TARDIO: Uh-huh. I start a trial
25 in a few weeks, and we're --

1 THE COURT: Yes.

2 MR. TARDIO: -- starting to get geared
3 up for that.

4 THE COURT: I understand.

5 So you've got to -- you've got to get
6 somebody to come in your place.

7 MR. TARDIO: (Nods head.)

8 THE COURT: Let's see. What about
9 Thursday, the 16th? I've got -- let's see. I've
10 got to see my eye doctor, got some lab work I've got
11 to do early. Start at 7:45 with the eye doctor.
12 8:30, lab work. 11:30, Weighted Caseload Committee
13 meeting. Noon, all judges meeting. And I've got a
14 couple of settlement approvals in the afternoon.
15 But I can -- I could maybe do this at 2:00 on the
16 16th.

17 MR. NOLAN: That would be fine.

18 THE COURT: How would that work?

19 MR. TARDIO: I have the 16th open. I
20 know I have a phone hearing that's only going to
21 take about 15 minutes. Let me just make sure it's
22 not at 2:00.

23 THE COURT: Or it can be at 2:30.

24 MR. TARDIO: Yeah. Let me just see if
25 I . . .

1 The only thing I have on the 16th is at
2 11:30, so 2:00 is fine.

3 THE COURT: That sound okay to you,
4 Mr. Nolan?

5 MR. NOLAN: Sure.

6 THE COURT: All right. That will give
7 y'all time to digest, and supplemental affidavit.
8 That will probably work better for me, too.

9 Okay. 16th, May the 16th, Thursday,
10 2:00. And we'll argue the privilege issue.

11 Again, I mean, I know y'all have done a
12 great job of outlining that already in your
13 preliminary statements. Thank you for that.

14 MR. NOLAN: Thank you for your help,
15 Judge.

16 THE COURT: Thank you all very much.

17 MR. TARDIO: Your Honor, let me just
18 make one statement before we all leave.

19 THE COURT: Yes.

20 MR. TARDIO: We have now answered --
21 and I had it written down -- 93 interrogatories, 139
22 requests, 60 requests for admissions, produced 75 or
23 80 policies, you know, a thousand pages. Plus,
24 obviously, today's going to produce more work.

25 I don't know, without going back

1 through my notes, the rulings today, how long it's
2 going to take to produce this stuff. I don't know.

3 THE COURT: Think about it between now
4 and Thursday. Let's talk about that. I know what
5 your next question is.

6 MR. TARDIO: Well --

7 THE COURT: If you can't produce it
8 all, can't get it all done by when the depositions
9 start, Plaintiffs are then in a position of having
10 to say, "Well, we'll go ahead without it," or we'll
11 postpone the depositions for a reasonable period of
12 time to get you to get it together. I mean, I don't
13 know any other thing to do except just see what it
14 looks like. I know it's a lot of information. And
15 I know it may be not possible to produce it all
16 by -- in time for the Plaintiffs' counsel to review
17 it, digest it, and then break down questions that
18 will be asked of the deponents at the depositions.
19 So I understand.

20 And then the -- then the Plaintiffs
21 will have to make a decision about whether to go
22 forward with what you've got and be locked into not
23 taking those depositions again, or postpone for a
24 short period of time.

25 It's just practical issues that we all

1 have to face.

2 MR. NOLAN: Sure.

3 THE COURT: And I think the Defense,
4 you know, so far have shown good faith in getting
5 the information to you-all, to the Plaintiffs.

6 MR. NOLAN: And I believe they'll
7 continue to do that. I think the Court has ruled on
8 these things.

9 THE COURT: I think so, too.

10 MR. NOLAN: So, you know, I believe
11 there's a lot of information that can be pulled
12 together.

13 THE COURT: Okay. Well, we'll see.

14 MR. TARDIO: We'll do our best.

15 THE COURT: Yes. That's all you can
16 do.

17 All right. Well done, gentlemen.
18 Thank you very much.

19 MR. TARDIO: Thank you, Your Honor.

20 MR. NOLAN: Thank you.

21 (Proceedings were adjourned at
22 4:13 p.m. to be continued Thursday, May 16, 2013, at
23 2:00 p.m.)

24

25

1 REPORTER'S CERTIFICATE

2

3 I, Deborah K. Watson, RPR, LCR, Notary
4 Public and Court Reporter, do hereby certify that I
5 recorded to the best of my skill and ability by
6 machine shorthand all the proceedings in the
7 foregoing transcript, and that said transcript is a
8 true, accurate, and complete transcript to the best
9 of my ability.

10 I further certify that I am not an
11 attorney or counsel of any of the parties, nor a
12 relative or employee of any attorney or counsel
13 connected with the action, nor financially
14 interested in the action.

15 SIGNED this 29th day of May, 2013.

16

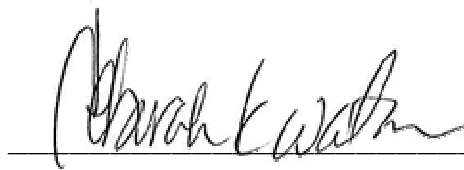
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Deborah K. Watson, RPR, LCR



22 My Notary commission expires: 9/20/2016

23 Tennessee LCR No. 446

24 Expires: 6/30/2014

25

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1 P R O C E E D I N G S

2 THE COURT: Good afternoon, everyone.

3 MR. TARDIO: Good afternoon, Judge.

4 MR. NOLAN: Good afternoon.

5 THE COURT: All right. And I know you
6 all are all under a -- under the gun to provide
7 information. I appreciate everybody working hard,
8 gathering information, getting it together, and
9 getting it to me for my review. And I've been trying
10 to review a lot of the last-minute filings before we
11 started today. That's why we got a little bit of a
12 late start, plus my meetings that I was involved in.
13 We had a caseload study and an all-judges meeting on
14 various issues that affect the 20th judicial district.
15 That's what I've been involved in most of the day.
16 Since I'm presiding judge for this district, I preside
17 over all these meetings. I set the agendas. I
18 prepare the agendas, talk to all the judges ahead of
19 time and make sure everybody has something on the
20 agenda they want to discuss, so a lot of -- a lot of
21 things involved in the administrative part of what I
22 do, but I still like it all.

23 All right. So now I've got -- I've got
24 the information. And I guess maybe hear from the
25 plaintiffs on this because I've got supplemental

1 affidavits and additional information from the
2 defense.

3 MR. NOLAN: Your Honor, I am taking the
4 low tech approach today.

5 THE COURT: That's all right.

6 MR. NOLAN: I've got a notebook, if I
7 can --

8 THE COURT: Okay. Sure.

9 MR. NOLAN: -- tender this to the Court.

10 THE COURT: Sure.

11 MR. NOLAN: And basically what that has
12 in it, Judge, is everything that the defendants have
13 filed bearing on this particular issue --

14 THE COURT: Yes.

15 MR. NOLAN: -- as well as everything that
16 we've filed and it's indexed, and the very last tab is
17 a copy of the (inaudible).

18 THE COURT REPORTER: I'm sorry? Can you
19 repeat that?

20 MR. NOLAN: The quality improvement
21 committee statute.

22 Your Honor --

23 THE COURT: Which is TCA 68-11-272.

24 MR. NOLAN: Your Honor, if we look at
25 Tab 2 --

1 THE COURT: Yes.

2 MR. NOLAN: -- this is the full copy of
3 the 2012 contract that they filed yesterday, and,
4 frankly, Your Honor, it was upsetting for us to see
5 this document, and here's why: If you look at the end
6 of the document -- if you look at the end of the
7 document, Your Honor --

8 THE COURT: You see the date of signature
9 of Michael O'Neal?

10 MR. NOLAN: That's right.

11 THE COURT: 4/4/13?

12 MR. NOLAN: That's right. And, Your
13 Honor, that was six months after Diana Reed died and
14 two months after we propounded our discovery, so we
15 just don't understand what's going on. I mean, you
16 know, the sequence of events is that before the
17 hearing two days ago they filed a heavily redacted
18 contract that did not include this signature page and
19 no wonder why they didn't include this signature page.

20 So, Your Honor, we're in a circumstance
21 in which the defendant has the burden to establish
22 each and every element of this privilege. Privileges
23 are construed narrowly because they interfere with the
24 search for the truth according to our supreme court,
25 but they're playing hide the ball and that's not fair.

1 That's not right, Your Honor. It's not right for a
2 party who is trying to prevent families of such a
3 terrible tragedy from knowing information to approach
4 it in this sort of piecemeal fashion, so I guess our
5 first argument today, Your Honor, against this
6 assertion of privilege is that this approach shouldn't
7 be countenanced by this Court, frankly. It should be
8 rejected because this is a document which should have
9 been placed in front of the Court in full off the bat
10 so we would know that it wasn't even signed, this
11 contract, until two months after we propounded our
12 discovery. Now, the affidavits that are in the record
13 don't explain why that happened. That's not mentioned
14 in either the pharmacist's affidavit or the affidavit
15 of nurse Schamberg. So --

16 THE COURT: I saw that.

17 MR. NOLAN: -- secondly, Your Honor, as
18 the Court will recall two days ago, there was a
19 significant amount of argument about the fact that,
20 you know, this relationship with the pharmacist was
21 entered into for the purpose of improving the quality
22 of healthcare at STOPNC and that we need the
23 protection of this peer review statute in order to
24 give incentive for healthcare providers to enter into
25 relationships like this, and, therefore, it's just

1 critical that this privilege be enforced. But, Your
2 Honor, we have also filed, which is under Tabs --
3 under Tab 11 in our book, a copy of the -- the
4 Medicare regulations. It's 42 CFR Section 1448, and
5 that's a Medicare regulation, Your Honor, that governs
6 what the requirements are for an ambulatory surgery
7 center to be able to be paid for the pharmaceuticals
8 that it administers in its facilities. And it says
9 that the ambulatory surgery center must provide drugs
10 and biologicals in a safe and effective manner in
11 accordance with accepted professional practice and
12 under the direction of an individual designated
13 responsible for pharmaceutical services.

14 Now, under the next tab, Your Honor, we
15 have the guidance document that is provided by the
16 Center for Medicare & Medicaid Services that
17 interprets what that particular regulation means. And
18 that says as follows: "The ambulatory surgery center
19 must designate a specific licensed healthcare
20 professional to provide direction to the ASC's
21 pharmaceutical services. That individual must be
22 routinely present when the ASC is open for business,
23 but continuous presence is not required, particularly
24 when the ASC is open for long periods of time to
25 accommodate the recovery of patients for up

1 to 24 hours. Ideally, the ASC should have available a
2 pharmacist who provides oversight or consultation to
3 the ASC's pharmaceutical services, but this is not
4 required by the regulation unless the ASC is
5 performing activities which under state law may only
6 be performed by licensed pharmacists."

7 So, Your Honor, to paraphrase that, in
8 order to get paid by Medicare, you need to be able to
9 convince Medicare that you are administering
10 pharmaceuticals under the watchful eye of a pharmacist
11 to some extent. So with all due respect to the
12 arguments that have been advanced, it's just
13 disingenuous for them to say that this is all about
14 improving quality. It's a -- it's a government
15 regulation that is in place before this particular
16 party can get paid when it performs -- or -- or it
17 gives pharmaceuticals to folks who are on Medicare,
18 and we just bring that to the Court's attention.

19 Now, Your Honor, if we turn to Tab 7, we
20 find the verified Interrogatory Response Number 2 from
21 Saint Thomas Neurosurgical, and, as the Court sees,
22 we've asked them to walk us through all their
23 communications with NECC. And then they interpose an
24 objection based on the peer review statutes that we
25 made reference to. And then this is what the response

1 says, it says, "Specifically, STOPNC's discussions
2 with its pharmacist consultant and any outside
3 pharmacist regarding NECC are privileged..."

4 Is there another pharmacist involved
5 whose -- whose name is not in the record, who is not
6 discussed in any of these affidavits or contracts?
7 We're very concerned about that, Your Honor, and we
8 want to know whether there were -- were -- was any
9 other pharmacist in addition to Michael O'Neal who was
10 involved in this.

11 Now, Your Honor, if you turn to page 8 --

12 THE COURT: All right. While you're
13 right there, let me just ask the defense. That is --
14 that is specifically part of the defense's objection
15 to Interrogatory Question Number 2, which states that
16 the plaintiff is requesting the defense to "Identify
17 each communication (including face-to-face, telephone,
18 e-mail, or other communications) between NECC
19 (including its agents, employees or representatives)
20 and Saint Thomas Neurosurgical (including agents,
21 employees or representatives). For each communication
22 identified, please provide the following information."

23 And then part of the objection is that
24 state -- "Specifically, STOPNC's discussions" -- those
25 are initials, S-T-O-P-N-C-apostrophe-S; they stand for

1 Saint Thomas Outpatient Neurosurgical Center. When I
2 say "STOPNC," that's what I'm referring to. It says
3 S-T-O-P-N-C. Just an abbreviation. Benefit of the
4 court reporter is all I'm saying.

5 "Specifically, STOPNC's discussions with
6 its pharmacist consultant and any outside pharmacist
7 regarding NECC are privileged..."

8 Are there any other outside pharmacists
9 other than Mr. O'Neal who has been identified?

10 MR. TARDIO: There's no other outside
11 pharm -- there's no other pharmacy consultant. If you
12 turn to page 9 --

13 THE COURT: Okay.

14 MR. TARDIO: -- or it's actually
15 discontin -- I think it's the same response. It just
16 goes on for four or five different pages.

17 THE COURT: Okay.

18 MR. TARDIO: At the very top, that --

19 THE COURT: Yes.

20 MR. TARDIO: -- is what that is in
21 reference to. Ms. Schamberg consulted with
22 Dr. Culclasure and a pharmacist prior to sending a
23 list of names. Not Michael O'Neal. She consulted
24 with a pharmacist colleague at another facility, not
25 during the purchase of these steroids, right there,

1 prior to sending the list of names. And we -- it's
2 also identified in STOPNC's response to request for
3 production, one where it references specifically a --
4 "A handwritten note from a conversation with an
5 outside pharmacist has been redacted because it is
6 protected by the Tennessee peer review law,
7 Tennessee 68-11-272."

8 So, yes, that is different. That's not
9 the Michael O'Neal conversation. This is one
10 conversation. We identified the conversation. We
11 identified the document, the note that corresponds to
12 it, and we asserted the privilege. So I --

13 THE COURT: Okay.

14 MR. TARDIO: It's not -- I went through
15 all the requests this morning to assure myself that
16 there was no question that asked, "Did you consult
17 with any pharmacist about sending the patient list?"
18 And there isn't one because I think it would be
19 responsive to that, but we identified it anyway within
20 this long response.

21 So to answer Mr. Nolan's question, yes,
22 there is another pharmacist not the same as O'Neal,
23 not a pharmacist consultant, not somebody we retained,
24 a -- what I would characterize as a colleague that she
25 called and said, you know, "They're asking us to send

1 patient lists. What do you think?" That's protected
2 by the peer review statute too, and we asserted that
3 in this response and in Number 2 in the request for
4 production.

5 THE COURT: Okay. Thank you.

6 MR. NOLAN: Your Honor, we'd like -- we'd
7 like the name of that other pharmacist in the
8 facility. We think we're entitled to that just like
9 we were entitled to Mr. O'Neal's name, and none of
10 that was clear to us until this moment.

11 THE COURT: Do you have any problem?

12 MR. TARDIO: Well, I stand by the
13 objection that that's not going to lead to
14 discoverable admiss -- or that's not going to lead to
15 admissible evidence.

16 THE COURT: It may not, but...

17 MR. TARDIO: If Your Honor orders me to
18 release the name, I'm glad to do it. The
19 conversation's here, so I'm a little -- offended is
20 not the right word, but there's no hiding the ball.
21 The conversation is here in two different
22 interrogatories. It's identified. The document is
23 identified. The privilege is asserted. And if Your
24 Honor orders me to identify the name now -- they're
25 going to be taking Ms. Schamberg's deposition. They

1 could ask her all these questions, and we can assert
2 the privilege then, but...

3 THE COURT: Okay. Well, I don't think it
4 hurts anything to give the name of the pharmacist. I
5 mean, that -- that would be responsive to the
6 interrogatory question without revealing the
7 privilege. I mean, the name is not privileged as we
8 said the other day. I can't remember what day we were
9 here. Two days ago.

10 MR. TARDIO: Sure. Your Honor, let me
11 just -- for the record --

12 THE COURT: Yes.

13 MR. TARDIO: -- I don't believe it's
14 responsive to this interrogatory. This asks for
15 communications between NECC and STOPNC and that's not
16 one, but...

17 THE COURT: Well, it may --

18 MR. TARDIO: It may be -- the only
19 interrogatory it may be responsive to is this overall
20 interrogatory that asks for anybody with knowledge.

21 THE COURT: Yes.

22 MR. TARDIO: So by order of the Court
23 it's Pat Meacham (phonetic). She's at --

24 MR. CLINE: Beckham.

25 MR. TARDIO: Beckham. I'm sorry.

1 Beckham.

2 THE COURT: Okay. Pat Beckham. All
3 right. Spell the last name, if you know.

4 MR. TARDIO: I believe it's
5 B-E-C-K-H-A-M.

6 THE COURT: Okay.

7 MR. TARDIO: And that, again, was not
8 related to the purchase of these steroids, which is
9 what the interrogatories are asking. That's -- this
10 is in May of -- or April or May of 2012.

11 THE COURT: And state one more time what
12 that -- what that consultation with pharmacist Pat
13 Beckham was about.

14 MR. TARDIO: It was about when they asked
15 for lists of patients.

16 THE COURT: When plaintiff asked for
17 lists of patients?

18 MR. TARDIO: When NECC -- what happened,
19 Judge, is they -- we -- our relationship with NECC
20 started in June of 2011. We bought from them all the
21 way up through the middle of 2012, and then sometime
22 in the middle of 2012 they came to us and said,
23 "Because of Massachusetts law, we need lists of
24 patient names before we can send you the -- the
25 steroids." That's when Ms. Schamberg went to call up

1 Ms. Beckham, a colleague, and said essentially, "What
2 do you think?" And that's the conversation.

3 THE COURT: Okay.

4 MR. TARDIO: And I submit that that's
5 also protected by the quality improvement privilege.

6 THE COURT: What they talked about?

7 MR. TARDIO: Sure.

8 THE COURT: Yeah, I understand. All
9 right.

10 MR. TARDIO: It's a separate argument
11 than the O'Neal argument, but --

12 THE COURT: I understand. I just wanted
13 to make sure I understood the context of the
14 conversation. Thank you.

15 MR. NOLAN: Your Honor, I'd like to
16 address that very particular point.

17 THE COURT: Sure.

18 MR. NOLAN: You know, if we look at
19 page 8 of this particular interrogatory response,
20 STOPNC describes this sequence of events that occurred
21 in which it sent lists of patients' names to NECC, and
22 it says "Mr. Giamei stopped by STOPNC in early to
23 mid-2012 and spoke with Ms. Schamberg. He informed
24 Ms. Schamberg that NECC needed STOPNC to submit a list
25 of patients with each order. Debra informed

1 Mr. Giamei that STOPNC would not be able to predict
2 which patients would actually receive the MPA, and
3 Mr. Giamei said that that was fine because NECC just
4 needed a list of patient names. Mr. Giamei stated
5 that the requirement came from the Massachusetts Board
6 of Pharmacy.

7 "Ms. Schamberg then consulted with
8 Dr. Culclasure and a pharmacist" -- we now know
9 Ms. Beckham -- "prior to sending the list...

10 "Ms. Schamberg spoke with the
11 receptionist, Sherri DeZwaan, to determine the best
12 way for STOPNC to provide such a list. Ms. DeZwaan
13 suggested printing off the daily patient schedule.
14 For the next several orders, when STOPNC needed to
15 order MPA, Ms. Littleton asked Ms. DeZwaan to print
16 off a list of names, which she did. On at least one
17 occasion, Ms. DeZwaan was not at STOPNC when
18 Ms. Littleton placed an order. Ms. Littleton
19 submitted the order to NECC without the list, and NECC
20 filled the order. The lists have been produced in
21 STOPNCC's [sic] responses to plaintiff's first request
22 for production with patient names and addresses
23 redacted."

24 So, Your Honor, let's look at the paper
25 trail associated with that. If you look at Tab

1 Number 8, you find one of the documents that's been
2 produced, which is the NECC prescription order form
3 dated July the 24th of '12, and as you can see, Your
4 Honor, it includes two drugs, one of which is the
5 methylprednisolone, 500 units. It's -- it's
6 purportedly signed by Dr. Culclasure, and the names
7 are left blank. No patient names are identified.

8 Now, under Tab 9, Your Honor, we have one
9 of the patient lists that has been provided to us
10 as -- as being one of the lists that was faxed to
11 NECC. All the names have been redacted except the
12 last name, Your Honor, which is Mickey Mouse. So
13 here's the circumstance. We have a situation in which
14 NECC asked STOPNCC for help papering over a patient
15 safety pharmacy rule in NECC's home state,
16 specifically the individual prescription requirement.
17 And at the moment -- at the moment that NEC -- that
18 STOPNCC decided to send patient lists, which have
19 nothing to do with whether these patients actually are
20 going to receive the medicine -- patient lists that
21 include Mickey Mouse -- to NECC so it can supposedly
22 paper over this government requirement, we moved out
23 of quality improvement and into a conspiracy to
24 violate the law.

25 Now, Your Honor, when that happened --

1 when that happened, they stepped outside the statute.
2 If you look at the statute, Your Honor, which is under
3 Tab 13, you can see what the policy is in Tennessee.
4 It says, "It's the policy of this state to encourage
5 the improvement of patient safety..." That's the way
6 the statute begins. And what they want to do --
7 without tendering any affidavits regarding
8 Ms. Beckham, they want to ask this Court to -- to
9 bless this sequence of events by labeling it quality
10 improvement.

11 Your Honor, the facts just don't bear
12 that out. They have not met the burden of
13 establishing that their interaction with Ms. Beckham
14 is subject to the quality improvement committee
15 privilege, Your Honor, and the Court shouldn't view it
16 that way. We have facts suggesting that -- I mean,
17 whatever happened to the -- the Health Insurance
18 Portability and Accountability Act of 1996, HIPAA?
19 You know, I mean, these patients have federally
20 protected HIPAA privacy rights. Yet in order to get
21 around this individual prescription requirement up in
22 Massachusetts, they just send these names. They send
23 these patient lists up to NECC. So, Your Honor,
24 our -- our --

25 THE COURT: Redacted, I assume?

1 MR. NOLAN: No, no, no, no.

2 THE COURT: Not redacted?

3 MR. NOLAN: No, no, not redacted. Not
4 redacted. They just send the names. They send --

5 THE COURT: How do we know that? I mean
6 how I do know that?

7 MR. NOLAN: Well, I think -- and
8 Mr. Tardio can certainly confirm it, but what we've
9 gathered from the interrogatory responses is that the
10 names were redacted before the documents were produced
11 to us. You know, in other words --

12 THE COURT: But were not redacted when
13 they were sent to NECC?

14 MR. NOLAN: No. Because NECC wanted to
15 have something they could go to the government and
16 say, "Oh, oh, we know -- we've got individual names
17 that are associated with all these prescriptions." I
18 mean that's what was going on. There's a rule in
19 Massachusetts that says that pharmacies must file
20 reports attesting to the fact that when they're
21 compounding drugs they are doing so in response to a
22 patient-specific prescription. So they just ask their
23 customers, "Hey, send us up some -- some patient
24 lists," and this customer complied. Now, if that's
25 not a red flag that a compounding pharmacy is asking

1 you to just send up patient lists, regardless of
2 whether the folks are going to get shots, I mean, did
3 Mickey Mouse have a shot at -- at STOPNC?

4 I mean, we've been theorizing in our
5 office a lot about how Mickey Mouse's name got on this
6 list. Maybe that's their procedure if a famous person
7 comes into their shop and they don't want to be in
8 their system. I mean, I don't know, Your Honor, but
9 when you look at the interrogatory response, it
10 specifically says that when Mr. Giamei stopped by and
11 said "We need you to send us patient lists," they told
12 him that "Well, that doesn't mean these folks are
13 going to get the shots," and they went ahead and they
14 sent the lists anyway after consulting a pharmacist
15 and that -- Your Honor, they just -- there's just no
16 way. There is no way with a straight face that they
17 can tell this Honorable Court that that was done for
18 quality improvement purposes.

19 And so, Your Honor, it's our very
20 respectful position that we're entitled to all of the
21 communications with -- with Ms. Beckham on that
22 particular issue.

23 Furthermore, Your Honor, just given the
24 entire sequence of events here, we think we're
25 entitled to all the communication with Mr. O'Neal as

1 well. We just don't think, given the way this is
2 unfolding, the Court should find that they've met
3 their burden, and I appreciate the Court's indulgence.

4 THE COURT: All right. Thank you.
5 Mr. Tardio.

6 MR. TARDIO: Yes. We also appreciate the
7 Court's time, especially on a -- sounds like an
8 already busy day. Let me address first Mickey Mouse
9 because it sounds -- it sounds sexy. It's a --
10 something that sounds explosive, but it's incredibly
11 innocent. They used Mickey Mouse as a placeholder in
12 their system for years when they wanted to hold open
13 an appointment so that Dr. Culclasure could go over to
14 Howell Allen and see a patient. So Mickey Mouse was
15 used for years as essentially a dummy slot on the --
16 in the system because they couldn't just leave it
17 blank. It had nothing to do with this. It had been
18 used as a placeholder in the appointment system for
19 years. So that's neither here nor there and really
20 has nothing to do with why we are here today.

21 All that argument from Mr. Nolan was
22 great argument, a very -- a very good closing
23 argument. But the reason we're here in front of the
24 Court today is to determine whether or not reports
25 created by Michael O'Neal and communications between

1 Michael O'Neal and STOPNC, particularly Debra
2 Schamberg, are privileged from discovery
3 under 68-11-272. And to suggest -- this conversation
4 with Ms. Beckham is not -- there's been no motion to
5 compel. There's been no proof developed on that. I'm
6 here to talk about the reports from Michael O'Neal and
7 the communications with Mr. O'Neal, and they're
8 clearly, clearly privileged under 68-11-272.

9 And I have very, very little to say, but
10 I did do four slides for the Court's benefit to take
11 the Court through what I think are the important
12 points. At this -- at this point in the argument, I
13 think we've distilled it down to what we need to talk
14 about. And, again, the first and foremost point for
15 the Court respectfully to consider is the policy
16 behind the act, and it's very clear. It's in the
17 first section of the act.

18 The policy of this state and the
19 legislature's purpose in passing the statute is to
20 encourage healthcare providers -- healthcare
21 organizations like STOPNC -- to evaluate the quality,
22 cost, safety, and necessity of healthcare services
23 that they render, so that -- the legislature has said
24 we want healthcare organizations to do that. And to
25 do that the legislature says we've got to protect that

1 process. We've got to give them some incentive to do
2 this and some protection that allows these healthcare
3 organizations to do this without the fear of it being
4 used against them in litigation and the ability to
5 frankly discuss these issues within the four walls of
6 that facility.

7 Without this protection, if I'm a
8 healthcare provider, I'm not going to feel free to
9 discuss whether the care provided within our facility
10 is necessary, of high quality, cost effective, and
11 safe. So that's why the legislature created the
12 statute in response to the decisions interpreting the
13 old peer review statute. And the protection that the
14 legislature built was to protect and privilege all --
15 all, not some -- all written records and
16 communications related to this quality improvement
17 process, protect them and privilege them from
18 discovery, direct or indirect, and from use in any
19 judicial proceeding.

20 So now we have a detailed record created
21 on this issue as Mr. Nolan has passed the Court
22 thirteen -- twelve or thirteen different filings.
23 What we have put in the record: Two affidavits from
24 Ms. Schamberg, the first that we filed a couple days
25 ago, the second we filed yesterday; an affidavit from

1 Michael O'Neal, and I know the Court's already read
2 all this. We filed the full 2007 contract and the
3 full 2012 contract.

4 And let me briefly touch on the dates
5 that it was signed. I don't know why Michael O'Neal
6 didn't sign the contract until April. I can tell you
7 Debra Schamberg apparently signed it before all this
8 happened, so clearly there was no conspiracy afoot in
9 September of 2012 before we even knew that there was
10 any contaminated product out there. So to suggest
11 that there was any conspiracy afoot with the
12 signatures on the contract doesn't fit when
13 Ms. Schamberg signed it.

14 And it doesn't matter anyway because,
15 first off, the 2007 -- even if we assume that this
16 contract wasn't signed until April of 2 -- or wasn't
17 consummated until April of 2007 -- or 2012, the 2007
18 contract was in place up until then, and it was
19 signed -- and even if we forget -- even if we assume
20 the contracts don't even exist. Let's say, you guys,
21 there was no meeting of the minds, you didn't have the
22 correct entity's name, you didn't renew the contract
23 like you were supposed to, even if we throw all that
24 out and assume the contracts don't exist, the
25 relationship is still there, and the -- he's still

1 performing the same functions. He's still performing
2 the same functions for the purposes set out in the
3 statute, and he's being paid for it. So whether it's
4 by verbal agreement, whether it's by written
5 agreement, whether it's simply he's going to come
6 assist them in evaluating their medication use for
7 payment on an irregular or regular basis, it doesn't
8 matter. All the contracts are filed to show is that
9 these are the functions that he fulfilled, and then
10 the affidavit testimony confirms that these are the
11 functions he fulfilled. So we -- we filed both
12 contracts. The fact that one was signed and the
13 second signature on one didn't come until April
14 of 2012 is completely irrelevant to the argument
15 before the Court today.

16 THE COURT: But it's 2013.

17 MR. TARDIO: I'm sorry. 2013. Correct.
18 April 2013, with Ms. Schamberg signing in September
19 of 2012. Regardless, it's completely irrelevant to
20 what we're here for today because before April of 2013
21 the same relationship was in place.

22 THE COURT: Well -- and I -- I understand
23 what you're saying, but it seems that, you know, if
24 you're going to try to take advantage of the privilege
25 and that's why the privilege is there to be used, as

1 the legislature has intended it to be used, to
2 encourage the improvement of patient safety, quality
3 of patient care, evaluation of the quality, safety,
4 cost, processes and necessity of healthcare services
5 by hospitals, healthcare facilities, and healthcare
6 providers, it would seem the more paper you have to
7 establish that you're doing that the better, I mean,
8 because if you've got -- if you've got a privilege
9 that you're trying to assert, you've got to have some
10 basis for the privilege, and I understand what the
11 plaintiffs are saying. I mean, they're saying we're
12 questioning whether there's really any basis to
13 establish a privilege. I think that's what the
14 plaintiffs are saying. Is that right, Mr. Nolan?

15 MR. NOLAN: Yes, Your Honor. In part,
16 yes, absolutely.

17 THE COURT: I know that's not the whole
18 thing, but that's kind of what we're down to with
19 these contracts. So I -- but you may be right too,
20 that it may not matter. But if you're going to
21 establish the privilege, it seems to me that -- I
22 guess you could say, as you have -- as you have
23 argued, this is what we're doing. It's all verbal.
24 This is what -- this is what we're doing, and we are
25 doing this in compliance with Tennessee Code Annotated

1 Section 68-11-272.

2 And I guess -- and then there's -- from
3 the plaintiff's standpoint, they're saying, well, how
4 do we know? How do we know that just because you say
5 that? I think that's what they're saying.

6 MR. TARDIO: They can ask Debra Schamberg
7 why in the world did this contract not get signed by
8 the pharmacist consultant until April of 2013, and
9 they can take her answer and they can argue to the
10 jury that this indicates some conspiracy or some
11 impact on her credibility, and that's fine. That's
12 what trials are for. But the question before the
13 Court is whether the function that Mr. O'Neal filled
14 with STOPNC was within the confines of 68-11-272, and
15 in all the relevant times based on the affidavit
16 testimony that's in the record and the 2007
17 contract -- let's not forget that before this one was
18 signed, the 2007 contract sets out essentially the
19 same functions in a much less detailed fashion, so --

20 THE COURT: And let me back up.
21 That 2007 contract, that is Mr. O'Neal's signature.
22 Right?

23 MR. TARDIO: Yes, sir.

24 THE COURT: Okay. It's very scribbly for
25 a pharmacist. 3/20/0 -- what is that? 7?

1 Yeah, 3/20/07. That's his signature on that
2 February 1, 2007 --

3 MR. TARDIO: Yes, sir.

4 THE COURT: -- pharmacy consultant
5 contract?

6 MR. TARDIO: Yes.

7 THE COURT: Okay.

8 MR. TARDIO: And that's -- and he attests
9 to that in his affidavit. So even if we -- even if we
10 forget about the 2012 contract, the 2007 contract is
11 in place. And Schamberg, twice, and Mr. O'Neal have
12 attested under oath by affidavit that he was
13 performing these functions from the 2007 contract on,
14 so it's unrefuted. I mean, it -- you can argue about
15 what various dates mean, but it's unrefuted -- it's
16 unrefuted in the record that Mr. O'Neal's function
17 from 2007 forward was quality improvement as it
18 relates to STOPNC, that his role in this relationship
19 was for him to evaluate safety, quality, cost,
20 appropriateness and necessity of healthcare. And
21 that's what the proof in this record as we stand here
22 in May of 2013 establishes. It also establishes that
23 he reported and communicated to Ms. Schamberg, and
24 then Ms. Schamberg took these reports and
25 communications to the medical executive committee to

1 improve quality.

2 And the intent of the statute, the policy
3 behind the statute, is to protect those communications
4 so that when Ms. Schamberg goes to the medical
5 executive committee of which she's a part and talks
6 about what Mr. O'Neal says we're doing right or we're
7 doing wrong, she can frankly tell the medical
8 executive committee, "So that we can achieve the
9 purposes of the statute, improve healthcare." So
10 that's -- that's where we are. That's what the record
11 establishes. That is unrefuted in the record, and the
12 only thing -- the only thing that -- the only response
13 is argument about the dates the second contract was
14 signed.

15 And, again, it's unrefuted that this --
16 the -- that he acted -- and the -- the statute talks
17 about the activities of the participants in the
18 process. That's how it defines the privilege, what
19 are these people doing, not what's the name of their
20 committee, not what's the name of their physician,
21 what are they doing, what is their purpose, and what
22 is their function, and it's unrefuted as we stand here
23 today that Mr. O'Neal's actions, his activities, were
24 for quality improvement functions, and that, Your
25 Honor, is enough to establish the existence of the

1 privilege and to invoke the protections under the
2 statute.

3 Your Honor, respectfully, the record is
4 more than adequate to carry the burden to establish
5 the privilege applies to Mr. O'Neal's communications
6 and his reports, and we would respectfully ask the
7 Court to deny the motion to compel. Thank you.

8 THE COURT: Thank you. Mr. Nolan.

9 MR. NOLAN: Your Honor, you're correct
10 that because they have the burden of establishing this
11 privilege there needs to be a basis for it, and as the
12 Court will recall when they originally filed their
13 brief in response to our motion to compel, they made a
14 big, big deal out of the 2012 contract. That's the
15 contract that they relied on. And they filed part,
16 but not all, of the contract and they were prepared to
17 come in here and argue that, hey, we've met our
18 burden; this contract is important; it cloaks
19 everything with quality improvement privilege, and
20 this information should not be revealed to the
21 plaintiff. And it's only after things didn't go well
22 two days ago that they decided to put in the full
23 contract and now we know, well, that contract didn't
24 even exist at the time Diana Reed died. It hadn't
25 been signed even though their brief quoted huge

1 passages from it.

2 Your Honor, that's just not the way that
3 court business should be conducted. It's just -- it's
4 just not appropriate. And then to come -- come back
5 here again with all of these after-the-fact,
6 self-serving affidavits that rely on these contracts
7 that use -- you know, all the names are messed up. I
8 mean, we've placed into the record the fact that Saint
9 Thomas Outpatient Neurosurgery Center, LLC, has gone
10 by that name and that name only since December the 9th
11 of 1999. So, Your Honor, I just don't -- it's -- with
12 all due respect, you know, if they had come forward
13 with contracts that made sense, that actually used the
14 right party's name, that would be one thing, but they
15 have not done that in this particular circumstance.

16 And we've also put into the record, Your
17 Honor, some facts to rebut their contentions. You
18 know, we've shown the Court that Medicare has rules of
19 what sort of consultants and pharmaceutical help has
20 to be used in order for outfits like this to be paid,
21 so there is an alternative explanation in the record
22 for the purposes of this particular arrangement.

23 Your Honor, if the Court finds in favor
24 of the plaintiff on this issue, it will not have a
25 chilling effect on anything. There is always an

1 incentive by healthcare providers to do a good job.
2 There's always an incentive by healthcare providers to
3 improve the quality of their health -- healthcare
4 because that's good for the patients. It's good for
5 the customers. It's good risk management. It's good
6 for everyone. So there's just no reason to construe
7 this statute as broadly as they are suggesting. Your
8 Honor, as I mentioned last time we were here, if -- if
9 you construe it as broadly as they're suggesting, it
10 could swallow virtually everything in the case, and
11 that's what we're worried about. We don't want to get
12 into these depositions and every time the word
13 "pharmacist" crosses our lips, a witness is being
14 instructed not to answer, and we're very, very worried
15 about that eventuality. So, Your Honor, if the Court
16 has no other questions, then that's all I have left to
17 say.

18 THE COURT: All right. Thank you. Thank
19 you very much. Let's see. Mr. Tardio, can you tell
20 me -- and I may have missed it, because I did -- I did
21 read these affidavits, but I didn't put the study time
22 that I do a lot -- to a lot of these things to make
23 sure I'm understanding because sometimes it takes more
24 than one reading to really fully comprehend what I'm
25 looking at. The name of the facility is what I'm

1 talking about, and we've got -- let's see. The
2 defendant is Saint Thomas Outpatient Neurosurgical
3 Center, LLC, and the filing that Mr. Nolan was talking
4 about from the secretary of state's office does in
5 fact show that Saint Thomas Outpatient Neurosurgical
6 Center, LLC, has been incorporated under that same
7 name from December the 10th of 1999 -- well, let's
8 see. Maybe I'm -- maybe I've got that -- sorry.
9 Let's see. Here we go. Yes. From 12/10 of 1999
10 through -- and has filed the proper annual reports --
11 through March 26, 2012, to continue -- from the
12 secretary of state's standpoint -- for that entity to
13 continue being an operating corporate entity. And
14 then the contracts, of course, are the
15 February 1, 2007, between -- pharmacist Michael O'Neal
16 is with the entity entitled "Saint Thomas
17 Neurosurgical Associates," a different name than the
18 Saint Thomas Outpatient Neurosurgical Center, LLC.
19 And then the 2012 contract, which cites began the
20 first day of September 2012, is between Michael
21 O'Neal, pharmacist, and Saint Thomas Neurosurgery
22 Center, not exactly the same as Saint Thomas
23 Outpatient Neurosurgical Center, LLC, and I think the
24 affidavits say they're the same entity. Is that
25 correct?

1 MR. TARDIO: Yeah. The affidavits say
2 essentially both Schamberg and O'Neal -- O'Neal
3 drafted these, the pharmacist, if you can't tell, so a
4 lawyer didn't draft these. And his affidavit
5 testimony is that it's the wrong name; I put the wrong
6 name in there, but we still had a meeting of the
7 minds. And, again, the statute doesn't require that
8 there be a contract in place --

9 THE COURT: No.

10 MR. TARDIO: -- for the peer review
11 privilege to apply, but I think what the Court is
12 asking is whether or not the affidavit testimony
13 clears that up, and I submit that it does.

14 THE COURT: Okay.

15 MR. TARDIO: That it's simply
16 Mr. O'Neal's poor draftsmanship.

17 THE COURT: Well, there's no question
18 that the -- let's see. I don't -- where is that
19 previous peer view statute, the old one? There it is.
20 Good. Thank you. The Tennessee peer review law
21 of 1967, which is codified at Tennessee Code Annotated
22 Section 63-6-219, and then the -- well, there the
23 legislature states in Section (b)(1), it says, "It is
24 the stated policy of Tennessee to encourage committees
25 made up of Tennessee licensed physicians to candidly,

1 conscientiously, and objectively evaluate and review
2 their peers'" -- that's S apostrophe -- "professional
3 conduct, competence, and ability to practice medicine.
4 Tennessee further recognizes that confidentiality is
5 essential both to effective functioning of these peer
6 review committees and to continued improvement in the
7 care and treatment of patients."

8 And then the -- effective April 12, 2011,
9 Tennessee Code Annotated Section 68-11-272, the
10 quality improvement committee statute, which states in
11 Section (a), "It is the policy of this state to
12 encourage the improvement of patient safety, the
13 quality of patient care and the evaluation of the
14 quality, safety, cost, processes and necessity of
15 healthcare services by hospitals, healthcare
16 facilities and healthcare providers. Tennessee
17 further recognizes that certain protections must be
18 available to these entities to ensure that they are
19 able to effectively pursue these measures."

20 So it is very clear that the legislature
21 intends to protect quality improvement committees,
22 peer review committees, all those committees that seek
23 to continually monitor and make certain that
24 healthcare facilities are functioning in a safe manner
25 and provide safe care to their patients. And in order

1 to do that, they have to be critical at times of
2 what's going on with the healthcare facilities, and
3 those critiques are what have to be protected. And if
4 they're not protected, then the healthcare facilities
5 will never improve. They cannot improve without
6 critique and finding better ways to do what they're
7 doing, safer ways to do what they're doing, to assist
8 in making certain that patients are properly protected
9 by the healthcare providers when the healthcare
10 providers provide those essential services to their
11 patients.

12 So it's really clear that's what the
13 legislature intended, and it intended to protect it,
14 and it's very important that that be followed, so I
15 find that the evidence that I've seen so far protects
16 the conversations that Mike -- that pharmacist Michael
17 O'Neal has in that regard with regard to patient care.
18 He's part of a quality improvement committee, a
19 committee of one. The statute April 12, 2012 [sic],
20 clearly states that it can be the activity -- I'm
21 sorry. Here it is. TCA Section 68-11-272(b)(4) --
22 little B in parenthesis, Arabic 4 in parenthesis --
23 (as read) "'Quality improvement committee' or 'QIC'
24 means a committee formed or retained by a healthcare
25 organization, an activity of a healthcare

1 organization, or one or more individuals employed by a
2 healthcare organization performing the types of
3 functions listed in subdivisions (4)(A) through (P),
4 the purpose of which, or one of the purposes of which
5 is to evaluate the safety, quality, processes, costs,
6 appropriateness or necessity of healthcare services by
7 performing functions including, but not limited to the
8 following," and those functions listed are A
9 through P. They are not all-encompassing functions,
10 nor are they -- are all of the -- all A through P
11 required to be functioning functions in order to meet
12 the definition of what a quality improvement committee
13 does.

14 So based on what I have in front of me,
15 that -- the protection is present. I'm not so certain
16 about Pat Beckham, and I think your discovery may
17 reveal what her function was or is, and after we
18 determine what her function was or is, we'll determine
19 whether or not what she did is protected under the
20 statute. It sounds like it may not be, based on what
21 I'm hearing so far, but I don't know all the facts
22 yet.

23 MR. TARDIO: Would you like us to draw an
24 order?

25 THE COURT: Yes, if you don't mind. And,

1 now, let's do one other thing. When we left two days
2 ago, the -- and I know, Mr. Tardio, you're going to do
3 your best to provide additional discovery as per our
4 discussions for 3 1/2 hours or so two days ago on the
5 additional information that was requested by
6 plaintiffs in which some of which was objected to and
7 some of which were worked out by agreement, others of
8 which I had to rule on. You're going to do your best
9 to get that information to the plaintiffs so they can
10 be prepared to do the depositions starting June 4th.

11 Now, Mr. Nolan, I don't know when you're
12 going to get that information or if you are going to
13 get it all before June 4th when you start your
14 depositions, so I guess I need to know what your
15 position is, and maybe you -- maybe you don't know
16 that until you get the information whether you're
17 going to go forward with those depositions or whether
18 you want to postpone those depositions in order to get
19 all the information that has been ordered for you to
20 receive. So am I right? You just don't know the
21 answer to that yet?

22 MR. NOLAN: Your Honor, we -- we plan to
23 go forward with the depositions. I hadn't heard
24 any -- I haven't had any feedback from Mr. Tardio
25 about roughly when he thinks he can get the

1 information that's been compelled to us. That would
2 be helpful to know, generally speaking.

3 THE COURT: Do you have any idea,
4 Mr. Tardio?

5 MR. TARDIO: I think we're 36 hours from
6 the order, so --

7 THE COURT: I know.

8 MR. TARDIO: -- some of it will be quick
9 and some of it will be not so quick. I can tell the
10 Court we answered the e-mail question. The --
11 the 15,000 number that I cited to the Court is all
12 STOPNC -- or all Howell Allen employees went to STOPNC
13 from January 1, 2013 --

14 MR. CLINE: September.

15 MR. TARDIO: I'm sorry. From
16 September 1, 2013, up through April --

17 MR. CLINE: '12. September.

18 MR. TARDIO: I'm sorry. Let me back up.
19 It's the -- it covers just the outbreak period.

20 THE COURT: Okay.

21 MR. TARDIO: So from September '12 up
22 through April 2013, when we preserved them, so --

23 THE COURT: It wasn't as many as you
24 thought.

25 MR. TARDIO: No, it's -- the 15,000 is --

1 it's actually more -- there's more than I thought that
2 are actually preserved. That just covers the -- what
3 I would consider --

4 THE COURT: I see.

5 MR. TARDIO: -- to be the relevant time
6 period.

7 THE COURT: I see.

8 MR. TARDIO: Now, Your Honor instructed
9 me or ordered me to figure out how many e-mails we
10 have preserved from Schamberg, Littleton, Butler, and
11 Culclasure.

12 THE COURT: Yes.

13 MR. TARDIO: The number for all time
14 periods -- so some of these date back to '01, '02,
15 whenever they started saving their e-mails -- is
16 19,000-something, close to 20,000, so those are the
17 numbers. I submit to the Court we can't
18 review 19,000 e-mails between now and the 4th of June,
19 so I submit to the Court that a search term -- if --
20 if Mr. Nolan still seeks to go back before September
21 of 2012, then we're going to have to go the
22 search-term route.

23 MR. NOLAN: We'd be happy to collaborate
24 on some search terms.

25 THE COURT: All right.

1 MR. NOLAN: That would be fine.

2 THE COURT: All right. And even with
3 search terms you may have an issue getting all that
4 between now and the 1st of June.

5 MR. TARDIO: Probably. Also I don't know
6 the cost. I just don't know. I mean, I don't know if
7 that's something we do in-house or send out. My
8 suspicion is that it's something that we've got to
9 give an outside vendor to do, so anyway that is the
10 biggest project.

11 THE COURT: Yes. And what about the
12 other -- and, of course, I know that that's a big part
13 of the discovery that has been requested and ordered,
14 but what about the rest?

15 MR. TARDIO: Board minutes are going to
16 take a while. Five years of board minutes to go
17 through and redact.

18 THE COURT: That's right. You have to do
19 a redaction.

20 MR. TARDIO: And Howell Allen going
21 through their storage to look for documents related to
22 purchase of -- I think the Court's order was steroids
23 in general. If we limited it to injectable steroids,
24 that would help because I think steroids would cover
25 cortisone cream.

1 THE COURT: Is that agreeable?

2 MR. NOLAN: That's reasonable, yes.

3 THE COURT: Injectable steroids. That
4 will be the order.

5 MR. TARDIO: I figured that was the
6 intent of Mr. Nolan, but I don't know that that was
7 testified. Regardless, they're going to have to go to
8 storage and pull some documents, so it's -- it's a
9 sizable ordeal, and I don't have a definite time
10 frame.

11 THE COURT: I understand. All right. So
12 that's what I suspected would be the answer. So what
13 do you say now, Mr Nolan? Do you just want to wait
14 and see what happens? Because I don't want to subject
15 these folks to multiple depositions because we don't
16 have all of our documents, and I think from what I've
17 been seeing so far the defense is making a very good
18 effort to do what they need to do to produce those
19 documents, and their objections were valid. I mean,
20 they had valid reasons for objecting, and that's why
21 we're all here, and that's why I'm here. That's
22 what -- why everybody has a function to try to resolve
23 those kind of disputes. And so -- but we're left with
24 a very short window of time for them to gather that
25 information to get it to you for you to study to -- I

1 mean, I know you're going to have to look at it before
2 you start asking questions, so -- and I don't want to
3 subject these folks to multiple depositions again
4 because we don't -- we don't have all of our discovery
5 documents. And I think we've marched along, all of
6 us, as best we can to meet these deposition schedules
7 of June 4, 5, and 6. So we probably don't have an
8 answer right now, but you all know how I'm thinking
9 about the multiple depositions, and I've said that
10 earlier. We don't want to subject these folks to
11 multiple depositions where we can avoid it. I mean,
12 they may not be avoidable sometime, but we know right
13 now that it's going to be a task, maybe a very
14 difficult task to gather all this information by the
15 defense to get to the plaintiffs in a timely manner in
16 order for the plaintiffs to be -- plaintiff's counsel
17 to be prepared to take these important depositions,
18 and I know how important they are to the case, so I
19 guess just have to see -- see how it goes. And if you
20 all need me, I will -- I'll be available on the 3rd of
21 June to solve any of those problems that you might
22 need to address to the Court. And we can do it by
23 telephone. We can do it by -- you know, we can get
24 you in here. Make sure I -- I don't think I have
25 anything scheduled right now, do I?

1 MR. FOWLER: Something small each day, I
2 think.

3 THE COURT: Yeah. I was going to start a
4 two-week jury trial, but the lawyers respectfully
5 asked that they be allowed to continue that so they
6 could -- I could hear a motion for summary judgment in
7 that case before the jury trial which I'm hearing on
8 June 5th. Oh, I do have a pretrial conference for a
9 jury trial that is scheduled for June 17th that starts
10 at 1:00 p.m. on Monday, June 3rd, so -- and we don't
11 have all those yet, do we? We don't have those
12 motions in limine yet, do we?

13 MR. FOWLER: I don't think so.

14 THE COURT: So we don't know how many
15 there are. I don't think it's going to be that many.
16 So I can be available in the afternoon or maybe the
17 morning for a telephone conference, or I'll -- you
18 know, I'll just work you all in because I know your --
19 your depositions start on the 4th. Right? Tuesday
20 the 4th?

21 MR. NOLAN: That's correct.

22 THE COURT: I'll work you in. Just let
23 me know that you need me, if you do, and I'll work you
24 in.

25 MR. TARDIO: Thank you, Your Honor.

1 THE COURT: All right. Anything else we
2 can do today?

3 MR. NOLAN: No, Your Honor.

4 THE COURT: All right. Thank you all.

5 (Proceedings were adjourned at 3:41 p.m.)

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1 REPORTER'S CERTIFICATE

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3 I, Duke Firlus, RPR, LCR, Notary Public
4 and Court Reporter, do hereby certify that I recorded
5 to the best of my skill and ability by machine
6 shorthand all the proceedings in the foregoing
7 transcript, and that said transcript is a true,
8 accurate, and complete transcript to the best of my
9 ability.

10 I further certify that I am not an
11 attorney or counsel of any of the parties, nor a
12 relative or employee of any attorney or counsel
13 connected with the action, nor financially interested
14 in the action.

15 SIGNED this 30th day of May, 2013.

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Duke Firlus
Duke Firlus, RPR, LCR

22

23 My commission expires: September 8, 2013.
Tennessee LCR No. 579

24 Expires 6/30/2014

25